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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IAIN CALDER and JOHN SOUTH,
Appellants,

v.

SHIRLEY JONES and MARTY INGELS,
Appellees.

On Appeal from the California Court of Appeal, Second Appellate District

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STATEMENT AS TO JURISDICTION

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QUESTIONS PRESENTED

1. In determining whether the Constitution permits personal jurisdiction over an out-of-state reporter and editor in a libel case, is it improper to give weight to the First Amendment?

2. Do the First and Fourteenth Amendments and the Commerce Clause permit a California court to assert personal jurisdiction over a Florida editor and reporter solely on the ground that they worked in Florida on an article published by their Florida employer which allegedly injured California residents?

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On Appeal from the California Court of Appeal, Second Appellate District

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STATEMENT AS TO JURISDICTION

Appellants appeal from the judgment of the California Court of Appeal, Second Appellate District, entered in this case on December 15, 1982, holding that California Code of Civil Procedure § 410.10, as applied to authorize personal jurisdiction over Appellants in this case, does not violate the First and Fourteenth Amendments and the Commerce Clause of the United States Constitution.

OPINIONS BELOW

The opinion of the Court of Appeal is reported officially at 138 Cal. App. 3d 128 and unofficially at 187 Cal. Rptr. 825. It is reproduced in Appendix A, *infra.* The order of the Supreme Court of California denying hearing without opinion is unreported; it is reproduced in Appendix B, *infra.* The opinion of the Superior Court of the State of California for the County of Los Angeles holding that it had no personal jurisdiction over Appellants is unreported; it is reproduced in Appendix C, *infra.*

JURISDICTION

The judgment of the California Court of Appeal was entered December 15, 1982. The Supreme Court of California denied a timely petition for hearing on February 10, 1983. Notice of appeal to this Court was filed in the Court of Appeal on February 16, 1983. This Court has jurisdiction under 28 U.S.C. § 1257(2).

STATUTE INVOLVED

California Code of Civil Procedure § 410.10 provides:

> "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States:"

RAISING THE FEDERAL QUESTION

After receiving service of process by mail in Florida, Appellants by special apperance moved to quash service, challenging the validity under the First and Fourteenth Amendments of the United States Constitution of applying the California jurisdictional statute, Cal. Code of Civil Procedure § 410.10, to them. The trial court agreed with Appellants that the statute could not constitutionally be applied to them because "as the U.S. Supreme Court has made abundantly clear in its *World-Wide Volkswagen* and *Kulko* opinions, California may not assert jurisdiction beyond that which is permitted under the United States Constitution." Pp. 17a-18a, *infra*. In the court below, Appellants argued that "Were it to be interpreted otherwise [than as excluding them]," § 410.10 would violate the Due Process Clause of the Fourteenth Amendment." The court below rejected that argument. Appellants argued to the Supreme Court of California that "as now interpreted by the Court of Appeal in this case, § 410.10 violates the due process and free speech guarantees of the California and United States Constitutions." That court denied review. Because the constitutionality of the statute as applied was drawn into question, and

the decision below upheld its validity, this Court has jurisdiction on appeal under 28 U.S.C. § 1257(2). See, *e.g.*, *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 440-441 (1979); *Cohen* v. *California*, 403 U.S. 15, 17-18 (1971); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 289 (1921).[1]

STATEMENT

A. Facts.

Appellees, who are professional entertainers and California residents, brought this action for libel and related torts in a California state court against the National Enquirer, Inc., its local distributing company and the two Appellants, who are individuals. The claim was based on an article appearing in the Enquirer's October 9, 1979 issue.[2] Appellees demanded $20,000,000 from the defendants.

Appellant Calder is employed as editor and president of the Enquirer. Appellant South is employed by the Enquirer as a reporter, and his byline appeared on the article. Both Appellants are and were at all relevant times citizens and residents of Florida.

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[1] Although California's jurisdictional statute is drafted in terms that purport to be identical with constitutional limits, its constitutionality as applied was challenged below. However, if for any reason this Court were to conclude that appellate jurisdiction is lacking under 28 U.S.C. § 1257(2), we respectfully request that this jurisdictional statement be treated pursuant to 28 U.S.C. § 2103 as a petition for certiorari under 28 U.S.C. § 1257(3). *Cf. Kulko* v. *Superior Court*, 436 U.S. 84, 90 n.4 (1978). Title 28 U.S.C. § 2403(b) may be applicable.

[2] The Enquirer, which is a Florida corporation with principal place of business in Florida, did not contest the California court's jurisdiction and answered the complaint. The distributing company also answered and made no objection to the jurisdiction. The article stated that Appellee Ingels "has terrorized his staff, cheated stars, outraged advertisers and scandalized Hollywood" and "has one of the most notorious casting couches in all of Hollywood," and that Appellee Jones "has been driven to drink by his bizarre behavior."

The two Appellants were served with process by mail in Florida in accordance with the California "long-arm" statute, under the jurisdictional provisions of Cal. Code of Civil Procedure § 410.10. They caused special appearances to be entered on their behalf and moved to quash service of process, challenging the constitutionality under the First Amendment and Fourteenth Amendments of the application of § 410.10 to them. Affidavits and deposition testimony, none of which was disputed, showed the following:

—As to Appellant Calder, he is the editor of the newspaper with general supervision of its editorial activities and works at its single editorial office in Lantana, Florida. His duties were, in his words, "basically to oversee just about every function of the Enquirer." Calder never has had an office or place of business in California, nor has he ever engaged in any business activity in or with California in his personal capacity. Calder did not participate at all in the investigation, research, or writing of the article complained of. He performed only routine editorial services, and any such took place in his Florida office. P. 23a, *infra*.[4]

—Appellant South is a reporter employed by the Enquirer. Like Calder, he is a Florida resident and his office is at the Enquirer newsroom in Florida. He has never had an office in California, nor has he ever engaged in any business activity there in his personal capacity, nor owned assets nor maintained a bank account there. All of South's services in connection with the article, according to his uncontradicted affidavit, took place in Florida. P. 25a, *infra*.

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[3] Petitioners argued in the Court of Appeal that jurisdiction over employees in such circumstances also would unconstitutionally burden interstate commerce.

[4] Appellant Calder testified in a deposition that although he did not read the story when it was prepared, he probably saw the final page proofs of the article, "I would imagine I saw that." He stated that he also declined to print a retraction, because "I think we stand by the article and as far as I'm concerned the story is true."

South testified without contradiction that he was a party to at most four telephone calls to California that related to the article; three involved the investigation, and one was a call to one of the plaintiffs for verification or comment. All of these calls were placed by South from his Florida office. South also stated that over a four-year period in the course of his employment he had had occasion to travel to California more than twenty times in total over the four years. However, none of those trips, he testified, was connected with the article. See p. 25a, *infra*.[5]

B. The Superior Court's Ruling.

Based on the evidence submitted, which was all documentary, the trial court found:

> "From the record in this case, it appears that neither South nor Calder maintained any residence or business office within California. Editor Calder did not enter California nor even make telephone calls into the state during his work on the Ingels article. Reporter South made a few telephone calls into California, including one in which he read the substance of the article to plaintiff Ingels shortly before its publication. In addition, it may fairly be inferred from the record before the Court that Reporter South visited California at least once for purposes relating to the article. The totality of such contacts, in this Court's view, are insubstantial." P. 16a, *infra*.[6]

After ordering argument on the question whether the First Amendment had bearing on the jurisdictional out-

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[5] Twice during the year preceding the article Appellant South met in California with a frequent Enquirer source, John Lucas, with whom he discussed several possible stories. The record contains no evidence, however, that the subject of the article complained of was discussed at either meeting, and South's testimony that it was not is uncontradicted.

[6] The court's unexplained inference that South made one visit to California connected with the article had no basis in the record, in which South's contrary statement was uncontradicted. The court of appeal nevertheless accepted that inference. P. 4a, *infra*. See n. 15, *infra*.

come, the trial court granted the motions and held that it had no personal jurisdiction over either Appellant. Citing *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), *Kulko* v. *Superior Court*, 436 U.S. 84 (1978), and *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and distinguishing products-liability cases, the court emphasized that

> "The question presented by this case is whether further consideration is required because the case involves First Amendment freedom of expression and because the defendants sought to be brought into this jurisdiction are employees of the publisher. . . . [A]s the U.S. Supreme Court has made abundantly clear in its *World-Wide Volkswagen* and *Kulko* opinions, California may not assert jurisdiction beyond that which is permitted under the United States Constitution." Pp. 17a-18a, *infra*.

The court relied on authorities from the Second and Fifth Circuits [7] in further concluding that

> "the cases seem to be in agreement that First Amendment considerations should be weighed in the balance of fundamental fairness in resolving whether a state can compel a nonresident defendant to appear and defend an action. This proposition of federal constitutional law is binding upon this Court." P. 18a, *infra*.

C. The Court of Appeal's Reversal.

On appeal, however, the California Court of Appeal reversed, and held that the California statute could constitutionally be applied to both Florida Appellants, whom it described as "employees of the publisher of the allegedly defamatory article herein." P. 5a, *infra*. The court of appeal did not challenge the findings of the trial court; indeed, it acknowledged that

> "Neither defendant has ever owned assets or bank accounts in California, or engaged in business or been

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[7] *Buckley* v. *New York Post Corp.*, 373 F.2d 175 (2d Cir. 1967); *Walker* v. *Savell*, 335 F.2d 536 (5th Cir. 1964); *New York Times Co.* v. *Connor*, 365 F.2d 567 (5th Cir. 1966); *Edwards* v. *Associated Press*, 512 F.2d 258 (5th Cir. 1975).

> employed there. It may not be said that defendants' activities in California are extensive, wide-ranging, substantial, continuous or systematic.
>
> • • • •
>
> "As the trial court observed, defendant Calder did not enter California or even make telephone calls into the state in connection with his role in the preparation of the subject article; all of his acts with reference to that article apparently were performed in Florida." Pp. 6a-7a, *infra*.

Nevertheless, the court held, California's jurisdiction over the Florida editor and reporter was established simply because the complaint alleged an intentional tort with injury in California. As the court of appeal explained its view of the law:

> "For the purpose of determining whether a California court may assume jurisdiction over Calder in this lawsuit, it must be presumed that Calder, in participating in the publication of the article as its editor, intended to cause injury to plaintiffs in California where they reside; such injury in fact occurred. Accordingly, a valid basis exists for California's exercise of personal jurisdiction over Calder with respect to the causes of action alleged herein." P. 8a, *infra*.

The same reasoning, the court of appeal continued, also sufficed to create jurisdiction over Appellant South, the reporter. It went on to hold that, alternatively, jurisdiction over him could be established simply by his having made one telephone call from Florida to one of Appellees, p. 10a, *infra*; or, alternatively, by his other telephone calls (and, the court hypothesized,[8] one visit) from Florida to California to gather information for the article, pp. 9a-10a, *infra*. The court also weighed "the inconvenience to the defendant" against such other factors as "the interest of the plaintiff in suing locally" and the "interest of a state in providing a forum for its residents." P. 12a, *infra*.

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[8] See note 6, *supra*.

On two separate points of federal law, the court acknowledged that its decision was in conflict with cases from other jurisdictions. First, it noted that other courts, including the Ninth Circuit,[9] had held that acts of an out-of-state corporate employee in his corporate role would not establish jurisdiction over him. However, it specifically declined to follow those cases. Pp. 10a-11a, *infra*.

As for the First Amendment, the court of appeal held that it was reversible error for the trial court to have considered the First Amendment at all:

> "Plaintiffs contend that the trial court improperly applied a special First Amendment test in determining that the court may not assume jurisdiction over defendants Calder and South. We agree." P. 4a, *infra*.

The court of appeal held that "personal jurisdiction over them must be determined in accord with traditional principles unaffected by First Amendment considerations." P. 5a, *infra*. The court acknowledged that its ruling on this point was contrary to the holdings from the Fifth Circuit that had been relied on by the trial court, but said it preferred to follow opposing authority from other circuits.[10] Pp. 4a-5a, *infra*.

The court below ordered that its opinion be published.[11] The Supreme Court of California denied review.

THE QUESTIONS ARE SUBSTANTIAL

This case concerns personal jurisdiction asserted over two out-of-state individuals who work for a publishing

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[9] *Forsythe* v. *Overmyer*, 576 F.2d 779 (9th Cir.), *cert. denied*, 439 U.S. 864 (1978).

[10] The cases on which it relied as having rejected the Second and Fifth Circuit decisions were *Church of Scientology* v. *Adams*, 584 F.2d 893 (9th Cir. 1978); and *Anselmi* v. *Denver Post, Inc.*, 552 F.2d 316 (10th Cir.), *cert. denied sub nom. Times Mirror Co.* v. *Anselmi*, 432 U.S. 911 (1977).

[11] Under California procedure "No opinion of a Court of Appeal . . . shall be published . . . unless such opinion (1) establishes a new rule of law or alters or modifies an existing rule, (2) involves a legal issue of continuing public interest, or (3) criticizes existing law." Cal. Rule of Court 976 (footnotes omitted).

company. On three important issues, the decision below conflicts with holdings of several U.S. courts of appeals and of at least two state supreme courts:

—On the question whether the First Amendment is to be weighed in determining personal jurisdiction over publishers or publishers' employees, there is an acknowleged split in the States and circuits. This record presents the issue in a clear and simple form.

—On the separate question whether jurisdiction can be obtained personally over individual out-of-state corporate employees merely by alleging they were responsible for what the corporation did, there is also a conflict in the lower courts. Most courts hold that the "fiduciary shield" doctrine bars personal jurisdiction over the out-of-state employee. Because the court below rejected the majority view, its decision conflicts with holdings by at least two state courts and five federal courts of appeals—including the federal courts of its own State of California.

—On the question whether telephone calls into a State are constitutionally sufficient to establish personal jurisdiction, the holding of the court below is again in conflict with the contrary holding of the federal court of appeals whose circuit includes California.

—On all three points, the decision below cannot be reconciled with decisions of this Court.

I. IN HOLDING THAT IT IS IMPROPER TO CONSIDER THE FIRST AMENDMENT WHEN WEIGHING PERSONAL JURISDICTION OVER OUT-OF-STATE EMPLOYEES OF AN OUT-OF-STATE PUBLISHER, THE DECISION BELOW CONFLICTS WITH HOLDINGS IN SIX FEDERAL CIRCUITS AND BY ONE STATE SUPREME COURT.

There is a widening split of authority in the lower courts as to whether, when weighing the contacts needed to establish jurisdiction over out-of-state publishers under *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), courts should consider the effect of such extra-

territorial jurisdiction on the exercise of First Amendment rights. The court below acknowledged the split, and said it chose not to follow the authorities relied on by the trial court.

The Fifth, Eleventh, and D.C. Circuits hold, as one of them stated a few months ago, that "federal jurisdiction is subject to First Amendment considerations when a nonresident publisher is sued for libel." *Cox Enterprises, Inc.* v. *Holt*, 678 F.2d 936, 937, *rehearing on other grounds*, 691 F.2d 989 (11th Cir. 1982). As the Fifth Circuit put the rule, "when a court attempts to assess whether jurisdiction over a defendant is reasonable, First Amendment considerations are a significant factor to be weighed." *Edwards* v. *Associated Press*, 512 F.2d 258, 266 (5th Cir. 1975). See also *Wolfson* v. *Houston Post Co.*, 441 F.2d 735 (5th Cir. 1971); *New York Times Co.* v. *Connor*, 365 F.2d 567 (5th Cir. 1966); *Walker* v. *Savell*, 335 F.2d 536 (5th Cir. 1964); *Margoles* v. *Johns*, 333 F. Supp. 942 (D.D.C. 1971), *aff'd*, 483 F.2d 1212 (D.C. Cir. 1973).

The Second Circuit applies essentially the same considerations by a slightly different analysis. In *Buckley* v. *New York Post Corp.*, 373 F.2d 175 (2d Cir. 1967), Judge Friendly for the court wrote that "the First Amendment could be regarded as giving *forum non conveniens* special dimensions and constitutional stature in actions for defamation against publishers and broadcasters." 373 F.2d at 183-84. Judge Medina, concurring, added that "I am not shocked to see the principles embedded in the First Amendment applied to the expanding subject of jurisdiction over the person." 373 F.2d at 184.

In two more circuits it has been held at the district-court level that consideration of the First Amendment is necessary when weighing extraterritorial personal jurisdiction over publishers. Thus a year ago Chief Judge Lord of the Eastern District of Pennsylvania acknowledged the split in the circuits, explaining that

> "the Tenth Circuit purports to be in complete disagreement with the Fifth Circuit on this issue." *McCabe* v. *Kevin Jenkins and Associates, Inc.*, 531 F. Supp. 648, 655 (E.D. Pa. 1982).

He concluded that "I choose to follow the more persuasive reasoning and logic of the Fifth Circuit," because "if courts freely found *in personam* jurisdiction over publishers of first amendment articles under the same standards imposed on commercial entities, the citizens of each state would soon find themselves with access only to those publications with in-state revenues sufficiently high to justify the cost of litigation within that particular jurisdiction." 531 F. Supp. at 654, 655. The rule that the First Amendment applies to the jurisdictional analysis has also been adopted in the largest district in the Seventh Circuit. *Gonzales* v. *Atlanta Constitution*, 4 Media L. Rptr. 2146 (N.D. Ill. 1979).

The decision below also conflicts with one handed down five months earlier by the Supreme Court of Georgia. In that case the Georgia Court explicitly held that First Amendment considerations apply in determining personal jurisdiction in a defamation case; moreover, it also held that contacts sufficient to establish jurisdiction over a corporate employer did *not* suffice to establish personal jurisdiction over (as here) an out-of-state employee. *Bradlee Management Services, Inc.* v. *Cassells*, 249 Ga. 614, 292 S.E.2d 717 (1982).[12]

The court below explicitly rejected the Fifth Circuit authorities, and chose not to discuss any of the additional cases from other jurisdictions that were cited to it. Instead, it relied on cases from three other circuits (two courts of appeals and one district court) which have declined to follow the majority rule: *Church of Scientology*

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[12] Also supporting consideration of the First Amendment in the jurisdictional analysis are distinguished commentators on jurisdiction. Weinstein, *Trends in Civil Practice*, 62 COLUM. L. REV. 1431, 1436 (1962); Leflar, *Conflict of Laws*, 36 N.Y.U.L. REV. 36, 42 (1961).

v. *Adams*, 584 F.2d 893 (9th Cir. 1978); *Anselmi* v. *Denver Post, Inc.*, 552 F.2d 316 (10th Cir.), *cert. denied sub nom. Times Mirror Co.* v. *Anselmi*, 432 U.S. 911 (1977) (Justices Stewart and Powell noting dissent);[13] and *David* v. *National Lampoon, Inc.*, 432 F. Supp. 1097 (D.S.C. 1977). All three of those opinions specifically recognized that the position they took was in conflict with that of the Fifth Circuit line of cases, which they criticized.

The lineup of decisions therefore is as follows:[14]

First Amendment Must Be Considered	First Amendment May Not Be Considered
Georgia	California (the present case)
Second Circuit	Fourth Circuit *
Third Circuit *	Ninth Circuit
Fifth Circuit	Tenth Circuit
Seventh Circuit *	
Eleventh Circuit	
D.C. Circuit	

* District Courts.

Besides being clear, the split in jurisdictions is very current. Three of the decisions with which the decision below squarely conflicts were handed down in 1982. *Cox Enterprises, Inc.* v. *Holt, supra*; *McCabe* v. *Kevin Jenkins and Associates, Inc., supra*; *Bradlee Management Services, Inc.* v. *Cassells, supra.* It is time for this Court to resolve the matter.

[13] In *Anselmi*, the brief in opposition to certiorari argued that the federal question was not dispositive and that as of 1977 the conflict in the circuits was not clear. See Brief of Respondents in Opposition, *Times Mirror Co.* v. *Anselmi*, No. 76-1524, at 3, 5 (1977). Subsequent to *Anselmi* have come at least six decisions in other circuits and states, as noted herein, four of them rejecting *Anselmi* and two (including the court below) following it.

[14] The position of the First Circuit is unclear. In recently rejecting jurisdiction over out-of-state defendants in a defamation case, it cited with apparent approval from both lines of cases. *Keeton* v. *Hustler Magazine, Inc.*, 682 F.2d 33 (1st Cir. 1982), *cert. granted*, No. 82-485 (Jan. 24, 1983).

II. IN HOLDING THAT PERSONAL JURISDICTION MAY BE ESTABLISHED OVER OUT-OF-STATE EMPLOYEES BECAUSE OF A PUBLICATION BY THEIR CORPORATE EMPLOYER, THE DECISION BELOW CONFLICTS WITH HOLDINGS BY FIVE FEDERAL COURTS OF APPEALS AND BY TWO STATE COURTS.

The decision below also creates a second major conflict in the states and circuits which is itself sufficient to call for this Court's plenary review.

Each of the Appellants filed an unchallenged affidavit which stated that each of the Appellants performed whatever acts he did respecting the article solely in the course of his employment and "not acting in a personal capacity." Pp. 23a, 25a, *infra*. The court below held that nevertheless the two individuals were personally subject to extraterritorial jurisdiction for the acts they had performed solely on behalf of their employer.

The court explicitly recognized, p. 10a, *infra*, that in thus permitting personal jurisdiction over an out-of-state employee for acts done outside the state for the corporate employer, its holding conflicts with that of the Ninth Circuit in *Forsythe* v. *Overmyer*, 576 F.2d 779 (9th Cir.), *cert. denied*, 439 U.S. 864 (1978). The Ninth Circuit there held that

> "a corporate officer who has contact with a forum only with regard to the performance of his official duties is not subject to personal jurisdiction in that forum." 576 F.2d at 783-84.

The Ninth Circuit so held also in *Chem Lab Products, Inc.* v. *Stepanek*, 554 F.2d 371 (9th Cir. 1977), in which the court explained that to exercise *in personam* jurisdiction over an individual in such circumstances "would violate 'federal due process.'" 554 F.2d at 372. Because the Ninth Circuit includes California, the result of the present holding is that from now on the federal constitu-

tional law of personal jurisdiction over out-of-state employees will be applied differently depending on whether ea suit is brought in a state court in California, or a federal court sitting in that State.

The present holding on this point also conflicts with decisions of many courts besides the Ninth Circuit. As Chief Judge Weinstein stated the rule in *Bulova Watch Co.* v. *K. Hattori & Co.*, 508 F. Supp. 1322 (E.D.N.Y. 1981), a case the court below rejected, "under the 'fiduciary shield' doctrine, the acts of a corporate officer or employee taken in his corporate capacity [even] *within the jurisdiction* generally do not form the predicate for jurisdiction over him in his individual capacity." 508 F. Supp. at 1347 (emphasis supplied). Here, of course, Appellants' acts occurred *outside* California rather than "within the jurisdiction," so the conflict with the rule is even greater.

By holding as it did, the decision below squarely conflicts with court of appeals decisions in *Escude Cruz* v. *Ortho Pharmaceutical Corp.*, 619 F.2d 902 (1st Cir. 1980); *Weller* v. *Cromwell Oil Co.*, 504 F.2d 927 (6th Cir. 1974); *Wilshire Oil Co.* v. *Riffe*, 409 F.2d 1277 (10th Cir. 1969); *Margoles* v. *Johns*, *supra*; and with decisions of numerous federal district courts, *e.g.*, *Idaho Potato Comm'n* v. *Washington Potato Comm'n*, 410 F. Supp. 171 (D. Ida. 1975); *State Security Ins. Co.* v. *Frank B. Hall & Co.*, 530 F. Supp. 94 (N.D. Ill. 1981). It conflicts with a decision made after thorough review of the issue earlier last year by the Supreme Court of Iowa, *State ex rel. Miller* v. *Internal Energy Management Corp.*, 324 N.W. 2d 707, 711 (Ia. 1982), holding the fiduciary shield doctrine "a due process limitation on the exercise of jurisdiction," and with recent holdings by the courts of Illinois, *e.g.*, *Hurletron Whittier, Inc.* v. *Barda*, 82 Ill. App. 3d 443, 402 N.E.2d 840 (1980). The same result is sometimes reached as a construction of state long-arm statutes without reaching the constitutional issue, *cf.*

Marine Midland Bank v. *Miller*, 664 F.2d 899 (2d Cir. 1981), but more often as a matter of due process, *e.g.*, *State Security Ins. Co.* v. *Frank B. Hall & Co.*, *supra*, 530 F. Supp. 98; *Weller* v. *Cromwell Oil Co.*, *supra*; for discussion see *State ex rel. Miller* v. *Internal Energy Management Corp.*, *supra*, 324 N.W.2d at 711.

Supporting the court below, and the only authority it cited on this point, is one district court opinion, *Donner* v. *Tams-Witmark Music Library, Inc.*, 480 F. Supp. 1229 (E.D. Pa. 1979). The district court in that case relied on two other decisions of district courts in the Third Circuit, and acknowledged that its holding might appear in conflict with those of the Second, Sixth and Tenth Circuits cited above, because "as a rule the courts have declined to exercise personal jurisdiction over individuals for their acts done in a corporate capacity." 480 F. Supp. at 1233.

The majority rule—that personal jurisdiction over a corporation does not carry with it personal jurisdiction over individual out-of-state employees—has particular force when there is present the added element of the corporation being a publisher. Thus in *Bradlee Management Services, Inc.* v. *Cassells*, *supra*, the Supreme Court of Georgia specifically distinguished the reporter from the publisher, and held that although it was the reporter's acts as an employee that gave rise to the alleged tort, nevertheless although there was personal jurisdiction over the out-of-state corporation there was none over the out-of-state reporter. That decision is irreconcilable with the present ruling. See also *Margoles* v. *Johns*, *supra*; *Stop-A-Flat Corp.* v. *Electra Start of Michigan, Inc.*, 507 F. Supp. 647, 651 (E.D. Pa. 1981).

The conflict with cases throughout the country on the issue of jurisdiction over a publishing company's employees for acts performed on behalf of the publisher, is a separate and substantial basis for noting jurisdiction. Indeed, it is essential to resolve that issue here if federal law henceforth is to be applied consistently by state and federal courts sitting in the State of California.

III. THE COURT'S ALTERNATIVE HOLDING THAT PERSONAL JURISDICTION CAN BE BASED ON TELEPHONE CALLS INTO THE STATE IS IN CONFLICT WITH HOLDINGS OF OTHER COURTS, INCLUDING THE NINTH CIRCUIT.

A third conflict arises because the court below held that as to Appellant South, jurisdiction could be based alternatively on his having made a single telephone call to one Appellee, or alternatively on three news-gathering telephone calls and one visit to California.[15]

The Ninth Circuit has held just the opposite. In rejecting a claim of extraterritorial personal jurisdiction, it held:

> "use of the mails, telephone, or other international communications simply do not qualify as purposeful activity invoking the benefits and protection of the state." *Thos. P. Gonzalez Corp.* v. *Consejo Nacional de Produccion*, 614 F.2d 1247, 1254 (9th Cir. 1980).

As for visits, the Ninth Circuit in the same case held that visits on business unrelated to the case—as were Appellant South's—do not count in the jurisdictional analysis:

> "We find the crucial fact to be that this visit pertained only to transactions not at issue in this case." *Ibid.*

The Seventh Circuit likewise has held that "we agree with appellants that it would be somewhat artificial to use these sporadic visits to measure the significance of their contacts with Illinois." *Fisons Ltd.* v. *United States*, 458 F.2d 1241, 1249 (7th Cir.), *cert. denied*, 405 U.S. 1041 (1972) (Stevens, J.). The same rule is rec-

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[15] Although one visit should not be jurisdictionally significant, we note that there is no record support for the court's speculation that South visited California even once in connection with the article, and in fact he specifically denied it and his affidavit so stating is uncontradicted. P. 25a, *infra*. The plaintiffs had the burden of establishing the jurisdictional facts, *McNutt* v. *General Motors Acceptance Corp.*, 208 U.S. 178, 189 (1936), and "since plaintiff failed to counter the [defendants'] affidavits, the jurisdictional facts stated therein are controlling." *Escude Cruz* v. *Ortho Pharmaceutical Corp.*, *supra*, 619 F.2d at 907.

ognized in other jurisdiction. See, *e.g.*, *Margoles* v. *Johns*, *supra*, 333 F. Supp. at 944; *Hurletron Whittier, Inc.* v. *Barda*, *supra*; *Warren* v. *Dynamics Health Equip. Mfg. Co.*, 483 F. Supp. 788 (M.D. Tenn. 1980).

Thus once again, because of the decision below, this Court's review is necessary to keep federal law from being applied differently by state and federal courts in California.

IV. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT.

Basing jurisdiction over these two individual Appellants on the publishing activity of their corporate employer is directly contrary to this Court's holding in *Hanson* v. *Denckla*, 375 U.S. 235 (1958), that

> "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. . . . [I]t is essential in each case that there be some act by which the *defendant purposefully avails* [*him*]*self* of the privilege of conducting activities within the forum State. . . ." 357 U.S. at 253, *quoted in Kulko* v. *Superior Court*, *supra*, 436 U.S. at 93-94 (emphasis supplied).

The same language from *Hanson* v. *Denckla* is repeated in *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, 444 U.S. at 298. It was ignored by the court below.

Appellants here did not personally avail themselves of the privilege of conducting their personal activities in California. The fact that a corporate entity with which the defendant has a relation may be amenable to process of a state does not mean that the state also can assert jurisdiction over an out-of-state individual defendant, when "it cannot be said that the *defendant* engaged in any purposeful activity related to the forum." *Rusk* v. *Savchuk*, 444 U.S. 320, 329 (1980) (emphasis in original).[16]

[16] Moreover, "financial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction

Accordingly, the trial court, relying on constitutional standards that it said "the U.S. Supreme Court has made abundantly clear in its *World-Wide Volkswagen* and *Kulko* opinions," held that personal jurisdiction over these two Florida individuals had not been established. The court below, however, in reversing, did not even cite *World-Wide Volkswagen* or *Kulko*. Indeed, in spite of extensive reference in the briefs to holdings of this Court, the court of appeal's only reference to any holding of this Court was a single passing citation to *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). See p. 6a, *infra*.[17]

Kulko v. *Superior Court*, 436 U.S. 84 (1978), was the most recent occasion on which this Court reviewed an attempt by California to expand its extraterritorial jurisdiction based on an allegation that an out-of-state person had "caused an effect in th[e] state." 436 U.S. at 88-89. Holding that due process requirements had not been met, this Court emphasized that policy considerations (there, "interests of family harmony" and preventing an "unreasonable burden on family relations," *id.* at 94, 98) are to be considered in deciding jurisdiction.

The court below concluded that for two Florida individuals to defend a multi-million dollar suit in a state court in California is not a substantial inconvenience to them, and emphasized instead that "this state and its residents and taxpayers have a substantial interest in providing a

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if they do not stem from a constitutionally cognizable contact with that State." *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, 444 U.S. at 299.

[17] The court below mistakenly claimed support for rejecting the First Amendment in the Chief Justice's concurring opinion in *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978), which questioned whether the First Amendment should be read to give the institutional press rights not enjoyed by others. No such claim is involved here, and in fact Appellants are individuals, not an institution. Moreover, the Chief Justice's concern was that such a reading of First Amendments rights would be too narrow, not that it would be too broad. See 435 U.S. at 797-802.

forum where a resident may seek whatever redress is due him." P. 12a, *infra*.

What this Court has held is something quite different:

> "Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, 444 U.S. at 294.

The Appellants here are individuals. As such they had no contacts with California. As in *Rusk* v. *Savchuk*, *supra*, "[h]ere . . . the defendant has *no* contacts with the forum, and the Due Process Clause 'does not contemplate that a state may make binding a judgment . . . against an individual or corporate defendant with which the state has no contacts, ties, or relations.' " 444 U.S. at 332-33, *quoting in part International Shoe Co.* v. *Washington*, *supra*, 326 U.S. at 319 (emphasis in original). As this Court said in *Shaffer* v. *Heitner*, 433 U.S. 186 (1977),

> "The differences between individuals and corporations may, of course, lead to the conclusion that a given set of circumstances establishes state jurisdiction over one type of defendant but not over the other." 443 U.S. at 204 n.19.

The decision below cannot be reconciled with any of those holdings of this Court. Nor can it be reconciled with the line of decisions of this Court that holds extraterritorial jurisdiction unreasonably applied to inhibit interstate businesses also violates the Commerce Clause, Article I, § 8. See, *e.g.*, *Denver & R.G.W. R.R.* v. *Terte*, 284 U.S. 284 (1932); *Michigan C. R.R.* v. Mix, 278 U.S. 492 (1929). That doctrine remains fully applicable today. See, *e.g.*, *Froning & Deppe, Inc.* v. *Continental*

Illinois National Bank & Trust Co., 695 F.2d 289, 294 (7th Cir. 1982).

V. THE ISSUE IS AN IMPORTANT ONE.

This Court recently recognized the importance of personal-jurisdiction standards in cases involving interstate publications by its grant of certiorari last month in *Keeton* v. *Hustler Magazine, Inc.*, No. 82-485. The present case is even more compelling for review because it involves a much greater stretch of personal jurisdiction—beyond the out-of-state publisher to reach its out-of-state employees. And unlike *Keeton*, in which the First Circuit's opinion did not discuss the jurisdictional effect of the First Amendment, here that issue was raised and extensively argued—and the constitutional claim was expressly rejected by the court below. Hearing argument of the present appeal in conjunction with *Keeton* can assist this Court in clarifying the legal principles in this area.

The holding of the court below, sitting in the nation's most populous state, muddies established principles of jurisdiction, creates two conflicting rules of federal personal jurisdiction within the state of California, and threatens editors, reporters, and the editorial process everywhere in the country. By not only rejecting First Amendment considerations, but also going further and finding personal jurisdiction over an out-of-state newspaper's out-of-state *employees*, it extends extraterritorial jurisdiction beyond any other decision on the books.

This Court has been conscious in many contexts of the "risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); see also *Smith* v. *California*, 361 U.S. 147, 151 (1959); *cf. Froning & Deppe, Inc.* v. *Continental Illinois National Bank & Trust Co.*, *supra*, 695 F.2d at 294 (personal jurisdiction rejected because of chilling effect on interstate banking system). The trial court—a court that followed this Court's decisions, only to be reversed—correctly anticipated the problem:

> "It may not be unfair to hold a publisher to account for compensatory and punitive damages in a remote jurisdiction if a sensational story he publishes is false. After all, it is the publisher who balances risk and reward in establishing the character of his publication, and it is the publisher who stands to make substantial profits if he publishes true stories of widespread interest.
>
> "It is quite another matter to hold magazine employees to the same accounting. . . . Few would be willing to risk writing or editing controversial articles for national publication if they could be required personally to appear in remote jurisdictions as individual defendants and possibly suffer judgments for punitive damages, and surely pay unlimited litigation expenses. . . . If such a state of affairs were to come to pass, the informed public would be the loser." Pp. 19a-20a, *infra*.

This is a case in which "an uneasy and unsettled constitutional posture . . . could only further harm the operation of a free press." *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241, 247 n. 6 (1974).

CONCLUSION

For the reasons stated, this Court should note probable jurisdiction. The Court may wish to set the case for argument in tandem with No. 82-485.

Respectfully submitted,

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February 22, 1983

APPENDICES

APPENDIX A

Opinion and Judgment of the California Court of Appeal, Second Appellate District

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

2 Civil No. 65403

(Super.Ct.No. C-305009)

SHIRLEY JONES, *et al.*,
Plaintiffs and Appellants,

v.

IAIN CALDER, *et al.*,
Defendants and Respondents.

Filed Dec. 15, 1982

APPEAL from an order of the Superior Court of Los Angeles County. Eli Chernow, Judge. Reversed.

Hayes & Hume, Paul S. Ablon and Richard P. Towne for Plaintiffs and Appellants.

Williams & Connolly, John G. Kester, F. Lane Heard, Selvin & Weiner and Paul P. Selvin for Defendants and Respondents.

Plaintiffs appeal from an order granting motion to quash out-of-state service of process [1] upon two of the defendants in an action to recover compensatory and punitive damages for libel, invasion of privacy and intentional infliction of emotional distress.

The verified complaint alleges: Defendant National Enquirer, Inc. is a Florida corporation transacting business in California; it publishes the National Enquirer, a

[1] The order is appealable. (Code Civ. Proc., § 904.1, subd. (c).)

weekly periodical of national circulation. Defendant Iain Calder is the editor of the periodical. Defendant John South is a writer employed by the corporate defendant. At all times mentioned, Calder and South acted in the scope of their employment and also acted "by virtue of their own motives as individuals." In the October 9, 1979, issue of the National Enquirer defendants printed and published an untrue and libelous article concerning plaintiffs, Shirley Jones and Marty Ingels.[2] That issue was sold and distributed in the County of Los Angeles, where plaintiffs are well known and enjoy good names and reputations both personally and in their occupations as professional entertainers. In making said publication defendants acted maliciously and with intent to injure, defame and disgrace plaintiffs, place them in a false light, and cause them to suffer humiliation and emotional and physical distress. In their actions directed toward plaintiffs, both before and after publication of said article, defendants cause plaintiffs to suffer great emotional distress. Defendants failed to comply with plaintiffs' demand for publication of a retraction of the defamatory article.

Calder and South are residents of Florida and process was served on them in Florida by mail (Code Civ. Proc., §§ 415.30, 415.40). They appeared specially and moved to quash service of the summons on the ground that the court lacked personal jurisdiction over them.[3] (Code Civ. Proc., § 418.10.) The affidavits of Calder and South in support of the motion state that each is employed by National Enquirer, Inc.—Calder as its president and editor, and South as a reporter; each has his place of business at Enquirer headquarters, located in Florida; neither Calder nor South has even had an office or place of business in California, or engaged in business there; neither has ever

[2] Attached to the complaint and incorporated therein by reference is a copy of the article. South's name appears at the end of the article, indicating that he is its author.

[3] Defendant National Enquirer, Inc. did not contest the court's jurisdiction over it, and has answered the complaint.

owned assets, obtained employment or had a bank account in California; Calder performed editorial services in Florida in connection with the article which is the subject of plaintiffs' lawsuit, but did not otherwise participate in the preparation of the article; South performed reporting services in Florida in connection with the subject article; in performing their respective services relating to that article, neither Calder nor South was acting in his personal capacity and neither traveled to California.

In opposition to the motion to quash, plaintiffs filed declarations and excerpts from depositions showing: As president and editor of National Enquirer, Inc., Calder's duties "are to oversee just about every function of the Enquirer . . . to oversee the whole editorial process." Prior to the publication of the allegedly defamatory article concerning plaintiffs, Calder reviewed its evaluation and saw the final page proof form; after publication he determined not to print a retraction. In the three or four years preceding publication of that article, Calder traveled to California only once; that trip was for pleasure, not on business for the National Enquirer. During the same period, South traveled to California more than 20 times on Enquirer business, staying an average of one to two weeks each time. From 1977 to October 1979 Jane Chesis, a California resident, was employed by National Enquirer, Inc. to furnish it with leads for stories. Chesis introduced South to one Bobby Lucas, A year before the subject article was published, South met with Lucas in California on two occasions to discuss possible articles for the Enquirer; during the same period South had 20-25 telephone conversations with Lucas. Lucas provided information for some of the material which appeared in the subject article. By telephone Chesis (in California) supplied South (in Florida) with other material contained in that article. Two or three weeks before the article was published, South telephoned plaintiff Ingels at his home in California and read the article to him; as a result Ingels became emotionally upset and physically ill.

In granting the motion to quash, the trial court (in its memorandum of decision) stated: "From the record in this case, it appears that neither South nor Calder maintained any residence or business office within California. Editor Calder did not enter California nor even make telephone calls into the state during his work on the Ingels article. Reporter South made a few telephone calls into California, including one in which he read the substance of the article to plaintiff Ingels shortly before its publication. In addition, Reporter South visited California at least once for purposes relating to the article. The totality of such contacts, in this Court's view, are [*sic*] insubstantial." The Court further determined that in a defamation process such as this, where freedom of the press is involved, "First Amendment considerations should be weighed in the balance of fundamental fairness in resolving whether a state can compel a nonresident defendant to appear and defend an action." The court concluded that such considerations necessitated the granting of the motion to quash.

Plaintiffs contend that the trial court improperly applied a special First Amendment test in determining that the court may not assume jurisdiction over defendants Calder and South. We agree. As authority for its application of such a test, the court cited *New York Times Co.* v. *Connor* (5th Cir. 1966) 365 F.2d 567, wherein it was held that "First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity." (P. 572. See also *Rebozo* v. *Washington Post Co.* (5th Cir. 1975) 515 F.2d 1208, 1214-1215; *Edwards* v. *Associated Press* (5th Cir. 1975) 512 F.2d 258, 266.) This view has been rejected in other federal courts (including those of the Ninth Circuit), which conclude that First Amendment protections are better considered in the context of substantive defenses on the merits than at the initial jurisdictional stage of a defamation proceeding. (*Church of*

Scientology of California v. *Adams* (9th Cir. 1978) 584 F.2d 893, 899; *Anselmi* v. *Denver Post, Inc.* (10th Cir. 1977) 552 F.2d 316, 324, cert. den., 429 U.S. 1041 [50 L.Ed.2d 753, 97 S.Ct. 170].) And in California it has been held that newspapers do not enjoy a special preference under the First Amendment in deciding in personam jurisdiction questions dealing with the publication of allegedly tortious material. (*Sipple* v. *Des Moines Register & Tribune Co.* (1978) 82 Cal.App.3d 143, 148-150 (hg. den.).) After discussing the concurring opinion of Chief Justice Burger in *First National Bank of Boston* v. *Bellotti* (1978) 435 U.S. 765, 796-802 [55 L.Ed.2d 707, 730-734, 98 S.Ct. 1407, 1426-1439], the *Sipple* court stated: "The conclusion of the Chief Justice that the First Amendment fails to give special protection to the 'institutional press' under a freedom of the press theory parallels the finding that it also fails to give special protection from jurisdiction to defendants whose tortious acts performed out of state arise from exercise of rights arguably protected by the First Amendment. Though the *Connor* decision, relied on by respondents, appears to give such protection, that decision 'has been widely criticized and disregarded [citations], and appears now to have been discarded by the Fifth Circuit itself [citations].' (*David* v. *National Lampoon, Inc.* (D.S.C. 1977) 432 F. Supp. 1097, 1100; accord *Anselmi* v. *Denver Post, Inc.* (10th Cir. 1977) 552 F.2d 316, 324.)" (82 Cal.App.3d at p. 149.)

Inasmuch as defendants Calder and South have no special First Amendment privilege by virtue of their status as employees of the publisher of the allegedly defamatory article herein, the right of a California court to assert personal jurisdiction over them must be determined in accord with traditional principles unaffected by First Amendment considerations.

Code of Civil Procedure section 410.10 permits California to exercise jurisdiction over nonresidents "on any

basis not inconsistent with the Constitution of this state or of the United States." This statute "manifests an intent to exercise the broadest possible jurisdiction. The constitutional perimeters of this jurisdiction are found in the decisions of the United States Supreme Court." (*Michigan Nat. Bank* v. *Superior Court* (1972) 23 Cal. App.3d 1, 6.) As a general constitutional principle, a court may exercise personal jurisdiction over a nonresident individual so long as he has such minimal contacts with the state that ". . . the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (*Internat. Shoe Co.* v. *Washington* (1945) 326 U.S. 310, 316-317 [90 L.Ed. 95, 101-103, 66 S. Ct. 154]; *Sibley* v. *Superior Court* (1976) 16 Cal.3d 442, 445.) "If a nonresident defendant's activities may be described as 'extensive or wide-ranging' [citation] or 'substantial . . . continuous and systematic' [citation], there is a constitutionally sufficient relationship to warrant jurisdiction for all causes of action asserted against him. In such circumstances, it is not necessary that the specific cause of action alleged be connected with the defendant's business relationship to the forum. [¶] If, however, the defendant's activities in the forum are not so pervasive as to justify the exercise of general jurisdiction over him, then jurisdiction depends upon the quality and nature of his activity in the forum in relation to the particular cause of action. . . . The crucial inquiry concerns the character of defendant's activity in the forum, whether the cause of action arises out of or has a substantial connection with that activity, and upon the balancing of the convenience of the parties and the interests of the state in assuming jurisdiction. [Citations.]" (*Cornelison* v. *Chaney* (1976) 16 Cal.3d 143, 147-148.)

Applying these rules to the instant case, it is clear that California does not have general jurisdiction over defendants Calder and South. Neither defendant has ever owned assets or bank accounts in California, or engaged in business or been employed there. It may not be said

that defendants' activities in California are extensive, wide-ranging, substantial, continuous or systematic. In *Cornelison, supra,* 16 Cal.3d 143, the court considered facts which revealed that the defendant had made 20 trips a year into California over a period of 7 years to deliver and obtain goods, and an independent contractor relationship with local brokers, and was licensed to haul freight by the California Public Utilities Commission; the court failed to find in these facts a basis for general jurisdiction by California courts. If general jurisdiction did not there exist, clearly there can be no general jurisdiction in the present case as a result of defendants' contacts with California consisting of occasional trips to that state. We now proceed to an assessment of the relationship between defendants' activities in California and the causes of action alleged herein.

As the trial court observed, defendant Calder did not enter California or even make telephone calls into the state in connection with his role in the preparation of the subject article; all of his acts with reference to that article apparently were performed in Florida. However, the requisite minimum contacts of a defendant with the forum state need not arise from his physical activity in that state. (*St Joe Paper Co.* v. *Superior Court* (1981) 120 Cal.App.3d 991, 997.) "Every state has a natural interest in effects occurring within its territory, even if the act causing those effects was committed elsewhere. (See Rest.2d Conf. of Laws, § 37, com. a.) . . . [¶] If a defendant commits an act or omission outside the forum state *with the intent* to cause a tortious effect within the state, the state may exercise jurisdiction over the defendant as to any cause of action arising from the effects. *The intent to cause tortious injury within the state when the tort actually occurs is generally a sufficient basis, without more, for the exercise of in personam jurisdiction.* 'The act may have been done with the intention of causing effects in the state. If so, the state may exercise the same judicial jurisdiction over the actor, or

over the one who caused the act to be done, as to causes of action arising from these effects as it could have exercised if these effects had resulted from an act done within its territory.' (Rest.2d Conf. of Law, § 37, com. a; see § 36, subd. (1).)" (*Kaiser Aetna* v. *Deal* (1978) 86 Cal.App.3d 896, 902; latter emphasis added. See also Judicial Council Comment, 14 West's Anno. Code Civ. Proc., p. 473; *Quattrone* v. *Superior Court* (1975) 44 Cal.App. 3d 296, 303-304). The complaint herein alleges that defendants, in publishing the defamation article, acted maliciously and with the intent to injure plaintiffs. The general rule for defamation is that everyone who takes a responsible part in the publication is liable for the defamation. (*McGuire* v. *Brightman* (1978) 79 Cal.App.3d 776, 789). For the purpose of determining whether a California court may assume jurisdiction over Calder in this lawsuit, it must be presumed that Calder, in participating in the publication of the article as its editor, intended to cause injury to plaintiffs in California where they reside; such injury in fact occurred. Accordingly, a valid basis exists for California's exercise of personal jurisdiction over Calder with respect to the causes of action alleged herein.

In support of a contrary conclusion, defendants cite *Sibley* v. *Superior Court*, *supra*, 16 Cal.3d 442, wherein it is stated (p. 446): "The mere causing of an 'effect' in California . . . is not necessarily sufficient to afford a constitutional basis for jurisdiction; notwithstanding this 'effect,' the imposition of jurisdiction may be unreasonable." *Sibley* was a breach of contract action and it was there held that despite defendant's relationship to California, and the effects thereby caused in California, the exercise of jurisdiction was unreasonable because it did not appear that defendant purposefully availed himself of the privilege of conducting business in California or of the benefits and protections of California laws, that defendant anticipated any economic benefit as a result of his dealings in this state, or that there were any

aspects of the transaction which were subject to special regulation in California. However, such conditions need not be met where jurisdiction is predicated on an act or omission committed outside the forum state with the intent to cause a tortious effect within the state. Thus, in *Abbot Power Corp.* v. *Overhead Electric Co.* (1976) 60 Cal.App.3d 272, an action for intentionally inducing breach of contract, the court, after discussing *Sibley* stated: "There is no reason to require any special circumstances where, as here, the conduct charged is an intentional and malicious tort against a forum-based corporation. The fundamental question is whether the exercise of jurisdiction is fair and reasonable. It is just as reasonable and fair, maybe more so, to subject a defendant to the jurisdiction of a state when it engages in conduct which is purposefully intended to harm a resident of that state as it is to subject a defendant to the jurisdiction of a state when the defendant has sought or anticipated economic benefit in that state from its out-of-state activities." (Pp. 281-282; fn. omitted.)

The foregoing analysis likewise applies to defendant South insofar as his writing and reporting activities in connection with the subject article were performed in Florida. Moreover, apart from the tortious effect which his Florida activities produced in California, South had other contacts with California sufficient to permit the courts of that state to assume personal jurisdiction over him in this action. The record shows that he gathered information appearing in the allegedly defamatory article in the course of at least one visit made by him to California and telephone calls which he made to the state. Expressed differently, the material for the article had its source in California and South tapped that source both by telephone and by personal visits to California. In addition, before the article was published South telephoned plaintiff Ingels at his residence in California and read to him the substance of the article, thereby causing him to suffer emotional distress accompanied by physical illness.

In *Abbot Power Corp.* v. *Overhead Electric Co., supra,* 60 Cal.App.3d 272, it was held that nonresident defendants' sending of letters into California which interfered with plaintiff's contractual relationship constituted the doing of a significant act in California for purposes of exercising jurisdiction over defendants. (P. 279.) By the same token South's telephone call to Ingels, which call was instrumental in the commission of one of the torts of which plaintiffs complain, constituted the doing of a significant act in California. For all of the above reasons, we conclude that South had sufficient minimum contacts with the State of California in respect to the causes of action at issue to justify assumption of jurisdiction by a California court over him in this lawsuit.

Defendants argue that California may not assume jurisdiction over them because they performed the allegedly tortious acts in their respective capacities as officer and employee of the corporate defendant, not as individuals.[4] In support of this contention defendants cite *Bulova Watch Co., Inc.* v. *K. Hattori & Co., Ltd.* (E.D.N.Y. 1981) 508 F. Supp. 1322, wherein it is stated: "Under the 'fiduciary shield' doctrine, the acts of a corporate officer or employee taken in his corporate capacity within the jurisdiction generally do not form the predicate for jurisdiction over him in his individual capacity." (P. 1347). See also *Forsythe* v. *Overmyer* (9th Cir. 1978) 576 F.2d 779, 783-784, cert. den., 439 U.S. 864 [58 L.Ed.2d 174, 99 S.Ct. 188]; *Quattrone* v. *Superior Court, supra,* 44 Cal.App.3d 296, 308.) Defendants' affidavits in support of their motion to quash service of summons state

[4] In its memorandum of decision, the trial court stated: "It may not be unfair to hold a publisher to account for compensatory and punitive damages in a remote jurisdiction if a sensational story he publishes is false. After all, it is the publisher who balances risk and reward in establishing the character of his publication, and it is the publisher who stands to make substantial profits if he publishes true stories of widespread interest. [¶] It is quite another matter to hold magazine employees to the same accounting. . . ."

that defendants, in performing their services relating to the subject article, were acting on behalf of the National Enquirer, Inc., and not in "a personal capacity." However, as stated in *Donner* v. *Tams-Witmark Music Library, Inc.* (E.D. Pa. 1979) 480 F. Supp. 1229, 1234: "It would be anomalous, and would defeat the purposes of the law creating substantive liability, to permit a corporate officer to shield himself from jurisdiction by means of the corporate entity, when he could not interpose the same shield as a defense against substantive liability. Therefore we hold that Aborn's allegedly tortious conduct in his capacity as president of Tams-Witmark may be considered to determine whether the court has jurisdiction over Aborn as an individual defendant." Unlike Calder, South is an employee rather than an officer of the corporate defendant. That fact, however, does not prevent the assumption of jurisdiction over him in this action. Thus, in *McGuire* v. *Brightman, supra*, 79 Cal.App.3d 776, the court rejected defendant's argument that jurisdiction over him was improper because he was a reporter, not the publisher of the defamatory article. Said the court: "Appellant has cited no authority for any contention that he may have that an author is not a proper defendant in an action for libel printed in a periodical. To the contrary, the general rule for defamation is that everyone who takes a responsible part in the publication is liable for the defamation. [Citation.] And even if appellant could somehow avoid liability for his acts for [the publisher], it would not follow that jurisdiction could not be maintained based upon those acts. Thus, it seems clear that appellant's status as the author instead of the publisher does not create a legal distinction invalidating jurisdiction over him. [Citations.]" (79 Cal. App.3d at p. 789.)

Once it is established that the defendant has the required minimum contacts in the forum state and that the cause of action is sufficiently connected with these minimum contacts, the propriety of an assumption of juris-

diction depends upon a balancing of the inconvenience to the defendant in having to defend himself in the forum state against both the interest of the plaintiff in suing locally and the interrelated interest of the state in assuming jurisdiction. (*Buckeye Boiler Co.* v. *Superior Court* (1969) 71 Cal.2d 893, 899.) Some of the factors involved in this balancing process include the relative availability of evidence and the burden of defense and prosecution in one place rather than another; the interest of a state in providing a forum for its residents; the ease of access to an alternative forum; the avoidance of a multiplicity of suits and conflicting adjudications; and the extent to which the cause of action arose out of defendant's local activities. (*Cornelison* v. *Chaney, supra,* 16 Cal. 3d 143, 151; *Fisher Governor Co.* v. *Superior Court* (1959) 52 Cal.2d 222, 225-226.)

In the present case, much of the evidence presumably is in California inasmuch as that is where the causes of action arose, where plaintiffs reside and pursue their careers, and where they are most seriously damaged by the alleged torts; California also is the residence of two of the persons (Chesis and Lucas) who furnished material appearing in the defamatory article published by defendants. The California Supreme Court "has repeatedly emphasized that this state and its residents and taxpayers have a substantial interest in providing a forum where a resident may seek whatever redress is due him. [Citations.] The state also has an interest from the point of view of orderly administration of the laws in assuming jurisdiction in cases where most of the evidence is within its borders and where a refusal to take jurisdiction may result in multiple litigation. [Fn. omitted.]" (*Hall* v. *University of Nevada* (1972) 8 Cal.3d 522, 525-526.) In their respective capacities as president-editor and reporter-writer for the National Enquirer, Calder and South most likely will be required to appear as witnesses and thus will be present in California regardless of whether a California court assumes jurisdiction over

them as defendant. Plaintiff sued National Enquirer, Inc. as well as Calder and South; the corporate defendant has not contested the California court's jurisdiction over it and the action is proceeding against it. If California does not assume jurisdiction over Calder and South plaintiffs may sue them in Florida, resulting in multiple litigation and possible conflicting adjudications. Finally, the torts of which South is accused relate directly to, and arise out of, his local conduct. Under these circumstances, it is fair and reasonable to subject defendants Calder and South to the jurisdiction of the California courts.

The order granting motion to quash service of process is reversed.

CERTIFIED FOR PUBLICATION

LILLIE, J.

We concur:

SPENCER, P.J.

DALSIMER, J.

APPENDIX B

Order of the Supreme Court of California Denying Hearing

CLERK'S OFFICE, SUPREME COURT
4250 State Building
San Francisco, California 94102

Feb. 10, 1983

I have this day filed Order HEARING DENIED.

In re: 2 Civ No. 65403

JONES & INGELS

vs.

CALDER & SOUTH

Respectfully,

Clerk

APPENDIX C

Opinion of the Superior Court for the County of Los Angeles

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C 305 009

SHIRLEY JONES and MARTY INGELS,
Plaintiffs,

vs.

NATIONAL ENQUIRER, INC., *et al.*,
Defendants.

MEMORANDUM OF DECISION

This case is based upon an article published in the National Enquirer, which article was allegedly libelous as to plaintiffs Shirley Jones and Marty Ingels. The motion before the Court is to quash service of process on two individual defendants claimed to be legally responsible for the article. One, John South, was the author; the other, Iain Calder, was the editor of the magazine. Both were employees of defendant National Enquirer; both reside in Florida. These individual defendants assert that California courts lack personal jurisdiction over them, relying upon the recent U.S. Supreme Court decisions in *World-wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), and *Kulko v. California*, 436 U.S. 84 (1978). The motion before the Court does not address jurisdiction over the publication and its publisher. There is no contention that National Enquirer may not properly be required to appear in California and defend this action.

In the first analysis, it is necessary to examine the contacts between the individual defendants on the one

hand, and the forum state, California, on the other, to determine whether there is a sufficient nexus for California to assert jurisdiction over these individuals. *International Shoe v. Washington*, 326 U.S. 310 (1945). From the record in this case, it appears that neither South nor Calder maintained any residence or business office within California. Editor Calder did not enter California nor even make telephone calls into the state during his work on the Ingels article. Reporter South made a few telephone calls into California, including one in which he read the substance of the article to plaintiff Ingels shortly before its publication. In addition, it may fairly be inferred from the record before the Court that Reporter South visited California at least once for purposes relating to the article. The totality of such contacts, in this Court's view, are insubstantial.

The most substantial basis for asserting a claim against the individual defendants is that both defendants knew, or certainly should have known, that the article would be published and read in plaintiffs' home community within California, that plaintiffs' personal and business reputations were likely to be substantially damaged by the publication, and that such substantial damage experienced by plaintiffs would occur in their home and business communities within California. Moreover, unlike the case of *World-wide Volkswagen, supra*, the location of the damage to the plaintiffs was not incidental nor remote from the business of defendant. The value of the article to the publisher was precisely that it was a sensational story that would expose unfavorable aspects of well-known people and, thus, would cause embarrassment and damage to the reputations of the plaintiffs. Thus, plaintiffs contend that California's jurisdiction extends sufficiently far to require the individual defendants to appear and answer for the alleged falsity of the article.

Plaintiffs contend that this case is analogous to one in which a defendant ships a dangerous and defective prod-

uct into the state, which leads to an accident within the state, causing substantial damage to a California resident. Indeed, if the injury complained of in this case involved a physical injury sustained as a result of a physically defective magazine shipped into California, then the analysis would end at this point and the motion to quash would be denied. *Buckeye Boiler v. Superior Court*, 71 Cal.2d 893 (1969).

The question presented by this case is whether further consideration is required because the case involves First Amendment freedom of expression and because the defendants sought to be brought into this jurisdiction are employees of the publisher. At bottom, the test for the validity of a state's assertion of jurisdiction over a nonresident defendant is not based upon whether the state's geographic boundaries were crossed, nor upon an overly refined analysis of how long a defendant spent on phone calls to California, but rather it is based upon an analysis of the fundamental fairness involved in light of traditional notions of justice. *International Shoe, supra.* The question becomes, then, whether, in assessing the fundamental fairness of the proposed assertion of jurisdiction, the Court should weigh and consider additional factors in cases where freedom of the press is involved. There appears to be some authority to the contrary in California, *Sipple v. Des Moines Register*, 82 Cal.App.3d 143; *McGuire v. Brightman*, 79 Cal.App.3d 776.[1] However, as the U.S. Supreme Court has made abundantly clear in its *World-Wide Volkswagen* and *Kulko* opinions,

---

[1] (But see Comment of Judicial Council to C.C.P. § 410.10, "Bases of Judicial Jurisdiction Over Individuals," (9):

> "Some actions, such as defamation, affect interests of a defendant that are protected by the First Amendment of the United States Constitution. For a state to have judicial jurisdiction over such action, it may be that the defendant must have a closer relationship to the state, or have caused effects of a more substantial nature in the state, than would otherwise be required."

California may not assert jurisdiction beyond that which is permitted under the United States Constitution. The most comprehensive discussions of the effects of the First Amendment, as it relates to the reach of a state's jurisdiction over nonresidents, are found primarily in the decisions of the U.S. Court of Appeals for the 5th Circuit in *New York Times v. Connor*, 365 F.2d 567 (1966); *Walker v. Savell*, 335 F.2d 536 (1964), and *Edwards v. Associated Press*, 512 F.2d 258 (1975), and in *Buckley v. N.Y. Post*, 373 F.2d 175 (2d Cir. 1967). These cases reached varying results as to whether a particular publication could be required to appear and answer particular complaints. However, the cases seem to be in agreement that First Amendment considerations should be weighed in the balance of fundamental fairness in resolving whether a state can compel a nonresident defendant to appear and defend an action. This proposition of federal constitutional law is binding upon this Court.

Applying First Amendment considerations, it appears to this Court that the balance favors the individual defendants. Whether or not the individual defendants South and Calder are required to appear as parties in this case, plaintiffs' rights can be fully satisfied. The publisher, who is the financially responsible party, will remain in the action regardless of the outcome of this motion. Indeed, it has not even been suggested that the National Enquirer itself is beyond California's jurisdiction. There is no reason to believe that plaintiffs' ability to win or collect a judgment would be enhanced if judgment were awarded jointly against the National Enquirer and its two employees, rather than the Enquirer alone. South and Calder may still be required to give testimony under oath at discovery deposition. Other discovery devices are available to bring to light any knowledge or information these individuals have relating to this action.

Indeed, in balancing the interests of all parties to this action, it appears that the principal practical effect of

holding the individual defendants as parties to this lawsuit would be to facilitate plaintiffs' claims for punitive damages against the individuals. Such claims are asserted in addition to plaintiffs' claims for such damages against the publisher. Surely the right of a plaintiff to punish a defendant resident of a remote jurisdiction, and to receive damages beyond those necessary to compensate him for his injury should not weigh heavily on the constitutional scale of fundamental fairness. On the other hand, if reporters and editors are required to appear in remote jurisdictions and defend against claims for punitive damages, it is foreseeable that such actions would have a chilling effect on reporters and editors.

It may not be unfair to hold a publisher to account for compensatory and puntive damages in a remote jurisdiction if a sensational story he publishes is false. After all, it is the publisher who balances risk and reward in establishing the character of his publication, and it is the publisher who stands to make substantial profits if he publishes true stories of widespread interest.

It is quite another matter to hold magazine employees to the same accounting. A reporter or editor who suffers an award of punitive damages would not be entitled to reimbursement from his employer, nor to indemnification based on any insurance policy the employee or the employer might have. Thus, punitive damages would come from the employee's own pocket. Few would be willing to risk writing or editing controversial articles for national publications if they could be required personally to appear in remote jurisdictions as individual defendants and possibly suffer judgments for puntive damages, and surely pay unlimited litigation expenses. Thus, prudent reporters and editors would have an incentive to avoid controversial stories vastly disproportional to the rewards they could expect for their diligence and industry in uncovering truthful but controversial stories, especially stories adverse to wealthy or powerful individuals. If

such a state of affairs were to come to pass, the informed public would be the loser. cf. *New York Times* v. *Connor*, *supra*.

Finally, quashing service in this case does not necessarily even defeat plaintiffs' right to recover punitive damages from the individual defendants. If their conduct is sufficiently wrongful, punitive damages might well be available if suit is brought in defendants' home jurisdiction, or in some other jurisdiction with which their contacts are more substantial.

For the foregoing reasons, the motions to quash are granted.

DATED: October 2, 1981.

/s/ Eli Chernow
ELI CHERNOW
Judge of the Superior Court

APPENDIX D

Notice of Appeal

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COURT OF APPEAL
SECOND DIST.

FILED
FEB 16 1983

CLAY ROBBINS JR.
Clerk

IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

Civil No. 65403

SHIRLEY JONES and MARTY INGELS,
Plaintiffs and Appellants,

v.

IAIN CALDER and JOHN SOUTH,
Defendants and Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Iain Calder and John South, Respondents herein, hereby appeal to the Supreme Court of the United States from the final judgment of this

Court entered December 15, 1982, that reversed the order of the Superior Court of the State of California for the County of Los Angeles entered October 2, 1981, quashing service of process on Respondents.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

WILLIAMS & CONNOLLY

By: /s/ John G. Kester
JOHN G. KESTER

/s/ F. LANE Heard III
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Attorneys for Respondents

February 16, 1983

[Certificate of Service Omitted in Printing]

APPENDIX E

AFFIDAVIT OF IAIN CALDER

STATE OF FLORIDA)
) ss.
COUNTY OF)

Iain Calder, first duly sworn, deposes and says:

1. I have personal knowledge of the facts herein stated and if sworn as a witness could testfy competently thereto.

2. I am a resident of Florida.

3. I am employed by the National Enquirer, Inc. as President and editor. This is my sole business activity. My place of business is the Enquirer headquarters, located in Lantana, Florida. I do not now have and never had an office or place of business in California.

4. I have never engaged in any other business activity in California or conducted interstate business with California in my personal capacity. I do not now and never have owned assets of any kind in California. I have never obtained credit or had any bank accounts in California.

5. I did not directly participate in the preparation of the Enquirer on the article which is the subject of this lawsuit. In 1979, I performed certain editorial services on behalf of the National Enquirer in connection with the article which is the subject of this lawsuit. During the course of my duties, I was not acting in a personal capacity and did not travel to California. Any editorial services performed in connection with the article took place in Lantana, Florida.

/s/ Iain Calder
IAIN CALDER

Subscribed and sworn to before
me on 20th day of April, 1981.

/s/ [Illegible]
Notary Public in and
for said County and State

Notary Public, State of Florida at Large
My Commission Expires Dec. 4, 1981
Bonded by American Fire & Casualty Company

APPENDIX F

AFFIDAVIT OF JOHN SOUTH

STATE OF FLORIDA)
) ss.
COUNTY OF)

John South, first duly sworn, deposes and says:

1. I have personal knowledge of the facts herein stated, and if sworn as a witness could testify competently thereto.

2. I am a resident of Florida.

3. I am employed by the National Enquirer, Inc. as a reporter. This is my sole business activity. My place of business is the Enquirer's national headquarters, located in Lantana, Florida. I do not now have and never have had an office or place of business in California.

4. I have never engaged in any business activity in California in my personal capacity and I have never conducted any business in California or engaged in interstate business with California in my personal capacity. I do not now and never owned assets of any kind in California. I have never obtained credit or had any bank accounts in California.

5. In 1979, I performed certain reporting services in Lantana, Florida on behalf of the National Enquirer, Inc. in connection with the article which is the subject of this lawsuit. In the course of my duties, I was not acting in my personal capacity and did not travel to California. All of my services performed in connection with the article took place in Lantana, Florida.

/s/ John South
JOHN SOUTH

Subscribed and sworn to before
me on 29th day of April,
1981.

/s/ Dana Owens Underwood
Notary Public in and
for said County and State

Notary Public, State of Florida at Large
My Commission Expires Dec. 7, 1983
Bonded by American Fire & Casualty Company

Office - Supreme Court, U.S.
FILED
JUN 17 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IAIN CALDER and JOHN SOUTH,
Appellants,

v.

SHIRLEY JONES,
Appellee.

Appeal from the California Court of Appeal, Second Appellate District

---

JOINT APPENDIX

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APPEAL DOCKETED FEBRUARY 22, 1983
JURISDICTION POSTPONED APRIL 18, 1983

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DOCKET ENTRIES

SUPERIOR COURT OF LOS ANGELES COUNTY

C 305009

JONES SHIRLEY, *et al.*
NATIONAL ENQUIRER, *et al.*

HAYES-HUME
Rogers-Wells
Williams & Connolly 9-16-81

Nature of Action: Misc Civil Complaint— Money Involved Code 0601

Reporter

Reporter

Year	Month	Day	PROCEEDINGS	FEES
1979	Nov	20	COMPLAINT FILED AND SUMMONS ISSUED	51.00
79	Dec	20	National Enquirer, Inc. ans. to comp. (Rogers)	36—
80	Mar	28	Plff mo to compel prod of docs. for facts/4-28-80 9:00 D80	
80	Apr	23	Plff ntc of mo to compel prod of docs 5/13/80 1:00 D-80	
80	Apr	28	Mo O/C D80	
80	Apr	29	Plff NTC of mo to Compel prod of docs 5/14/80 9:00 D-80	
80	May	5	Deft ARA Services Ans (Rogers)	36—
80	May	13	Mo O/C D80	
80	May	8	Table/Copies of authorities other than Calif Cases	

Year	Month	Day	PROCEEDINGS	FEES
80	May	8	P&A in Opposit to mo of Plff	
80	May	8	Dec & Affidavit in support of Opposit to mo to compel disclosure of confidential sources	
80	May	9	Plff reply memo to deft Opposit & mo to compel disclosure, suppl decl,	
80	May	14	Mo den D80	
80	Jun	11	Plffs. Mo. for ord. compel Ans. to ques Propounded at depsn. 7-2-80 9:00 D-80	
80	Jun	11	Stipulation	
80	June	11	Proof of Service by Mail	
80	Jul	2	Mo O/C D80	
81	4	17	Ntc of Mo for order permitting videotape recording of depo & P&A 4/27/81 9AM D80	12—
81	4	17	Order	
81	4	17	Stip for ord shortening time	
81	4	21	Proof of service	
81	4	23	Defts P&A in opp to Mo	
81	4	27	Mo grtd D80	
81	May	4	Order permitting Videotape recording of depo D80	
81	5	1	John South Iain Calder Ntc of Mot to quash service of Summons & Complt P/A Affidavits in support there of 5/18/81 9AM D-80 (Rogers)	97—
81	May	13	Deft John South & Iain Calder Ntc of Mo to Quash Service of Summons 6-2-81 9 AM Dept 80	12—
81	May	18	Mo O/C D80	

Year	Month	Day	PROCEEDINGS	FEES
81	6	2	Mo cont 8/5/81 9AM D80	
81	Jul	17	Deft Ntc of Hrg on application to appear as counsel Pro Hac Vice 8-3-81 900 D-81	12—
81	July	17	Deft substitution of atty. (Williams) Deft Iain Calder	
81	July	17	Deft. National Enquirer substitution of atty. (Williams)	
81	July	17	Deft. John South substitution of atty. (Williams)	
81	8	3	Mot grtd D80	
81	8	5	Mot to stand submitted D-80	
81	4	28	Req to Produce documents, inspection	
81	Sep	16	Deft sub of Atty (Connally)	
81	Aug	5	Reply to suppl P&A	
81	Jul	29	Reply to suppl mem in suppt of Mo	
81	Aug	5	Proof of service	
81	Jul	15	Suppl P&A in oppo to mo	
81	Jul	15	Attachments to suppl P&A	
81	May	28	Decl in suppt of oppo to mo (3)	
81	Jul	15	Suppl memo in suppt of Mo	
81	Oct	2	Submitted ruling, mo grtd D80	
81	May	28	Oppo to mo	
81	Oct	2	Memorandum of decision	
81	10	13	Plffs' OSC re deposition & for reasonable expenses & atty's fees 11-10-81 9AM D-80	12—
81	10	13	Plffs' decl re contempt	

Year	Month	Day	PROCEEDINGS	FEES
81	10	13	Plffs' decl in support of OSC	
81	10	15	AT ISSUE MEMORANDUM FILED	
81	Oct	13	Proof of svc of notice of taking depsn etc	
81	Oct	27	OSC re deposition & for reasonable expenses & atty fees 11-30-81 9:00 D80 Memo of P&A in suppt of this courts issuance of an OSC Decl re contempt Decl of K.W. May	12—
81	Oct	28	Notice of Appeal & design of record on appeal Ntc of Mot 11-25-81 9:00 D80	
81	10	28	in support of motion for answers to inter 11-25-81 9AM D80	
81	10	28	declarations in support of motions to compel answers to interrogatories 11-25-81 9AM D80	
81	10	28	NOM & M for prod of docus	
81	11	3	Additional designation of record	12—

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DOCKET ENTRIES

[COURT OF APPEAL
OF THE STATE OF CALIFORNIA]
Second Appellate District
LOS ANGELES County

Civil No. 65403

CIV 65403

ELI CHERNOW, JUDGE — C 305009

SHIRLEY JONES, *etal.*, *Aplts*	HAYES & HUME 132 So. Rodeo Dr. Beverly Hills, Ca. 90212
v.	
NATIONAL ENQUIRER, *etc., et al., defts & resps*	WILLIAMS & CONNOLLY 839 17th St., N.W. Washington, D.C. 20006 & SELVIN & WEINER 1900 Ave. of the Stars #2400, LA 90067
	Assigned To DIVISION ONE

DATE	PROCEEDINGS
May 18 1982	FILED RECORD C2 R1 APPEAL FROM Ord 10-28-81 #6540
Jun 17 1982	FILED APPELLANT'S OPENING BRIEF
Jun 21 1982	*Assigned to* DIVISION ONE RB 8-31-82
Sep 2 1982	FILED RESPONDENT'S BRIEF
Sep 21 1982	FILED APPELLANT'S REPLY BRIEF
Nov 5 1982	ORDERED ON CALENDAR Nov. 23, 1982—9 A.M.

DATE	PROCEEDINGS
Nov 23 1982	ARGUED AND SUBMITTED 138 C.A. 3d 128
Dec 15 1982	The order granting motion to quash service of process is reversed. (CFP) 21 pages Lillie, J. Spencer, P.J. Dalsimer, J. Petition for Hearing filed in Supreme Court
Feb 10 1983	Hearing denied by Supreme Court
Feb 14 1983	REMITTITUR ISSUED
Feb 16 1983	Filed Notice of Appeal to U.S. Supreme Court
Apr 21 1983	Filed certified copy of U.S. Supreme Court order postponing jurisdiction in the above-entitled case to the hearing of the case on the merits.

Law Offices
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A Professional Corporation
132 South Rodeo Drive
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Telephone (213) 858-2050

Attorneys for Plaintiffs

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No. C305009

SHIRLEY JONES and MARTY INGELS,
Plaintiffs,

vs.

NATIONAL ENQUIRER, INC., a Florida corporation; IAIN CALDER; JOHN SOUTH; SUNSET NEWS COMPANY, a California corporation; DOES 1 through 80, inclusive,
Defendants.

[Filed Nov. 20, 1979]

COMPLAINT FOR LIBEL; INVASION OF PRIVACY; INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

COMES NOW plaintiffs and for causes of action against defendants, and each of them, allege as follows:

1. At all times herein mentioned, defendant National Enquirer, Inc. was a Florida corporation authorized to do business and doing business in the State of California, County of Los Angeles. Defendant National Enquirer, Inc. at all times herein mentioned transacted business in the County of Los Angeles, State of California.

2. Defendant National Enquirer, Inc., publishes a weekly periodical of national circulation, which periodical is distributed and sold in the County of Los Angeles, State of California. In particular, the October 9, 1979

edition of the National Enquirer was sold and distributed in the County of Los Angeles, State of California.

3. Defendant Iain Calder (hereinafter "Calder") was at all times herein mentioned the editor of the National Enquirer.

4. Plaintiffs are informed and believe and on that basis allege that at all times mentioned herein defendant John South (hereinafter "South") was a writer employed by the National Enquirer.

5. Plaintiffs are informed and believe, and on that basis allege that at all times mentioned herein defendant Sunset News Company was a California corporation doing business in the County of Los Angeles and having its principal place of business in the County of Los Angeles, State of California. Defendant Sunset News Company is the distributor of the National Enquirer.

6. Plaintiffs are informed and believe, and on that basis allege that at all times mentioned herein and in doing the acts hereinafter set forth, defendants Calder and South were acting by virtue of their own motives as individuals and also were the agents and employees of defendant National Enquirer, Inc., and in doing the acts herein alleged were acting within the course and scope of their employment and all acts done by defendants Calder and South were accepted and ratified by defendant National Enquirer, Inc.

7. The true names and capacities of defendants sued herein as DOES 1 through 80 are unknown to plaintiffs at this time. Plaintiffs will seek leave of court to amend this Complaint to allege their true names and capacities at such time as they are ascertained. Doing the things alleged herein each defendant was acting as an agent of the other and was in the scope and course of said agency.

8. At all times herein mentioned plaintiffs, Shirley Jones and Marty Ingels have been well known and well

recognized by numerous and diverse citizens and people of the County of Los Angeles and, in fact, of the entire nation and plaintiffs at all said times have enjoyed good names and reputations both personally and in their occupation as professional entertainers.

9. On October 9, 1979, defendants, and each of them, printed, published and circulated, or caused to be printed, published and circulated, in the National Enquirer a libelous and defamatory article concerning plaintiffs. A copy of said article is attached hereto, marked Exhibit "A" and incorporated herein by reference. Said article is false, untrue, libelous and defamatory.

10. Further, the publication as alleged in paragraph 9 hereinabove, made plaintiffs appear before the public in an objectionable false light, or false position otherwise than as they are.

11. Plaintiffs are informed and believe, and on that basis allege that said publication was made by defendants with evil motive and malice, wilfully and wrongfully with the intent to injure, disgrace and defame plaintiffs, place them in a false light and intentionally cause them to suffer humiliation, mental anguish, and emotional and physical distress and with wanton and reckless disregard for the truth or falsity of the statements made.

12. On October 21, 1979, pursuant to California Civil Code Section 48(a), plaintiffs caused to be served upon defendants a Demand for Correction.

13. Defendants have failed to publish a Correction within the time and manner provided in California Civil Code Section 48(a).

14. Further, defendants and each of them in their outrageous actions directed toward plaintiffs, both prior to and subsequent to the publication of said article, caused plaintiffs great emotional distress, humiliation and suffering.

15. As a direct and proximate result of the publication of said article by defendants, plaintiffs have incurred special damages. All of the special damages incurred by plaintiffs are unknown at this time and plaintiffs will seek leave of Court to amend this Complaint when said damages have been ascertained.

16. As a direct and proximate result of the publication of said article by defendants, plaintiffs have suffered great damages for loss of reputation, shame, mortification, mental anguish and emotional and physical distress, and hurt feelings in the amount of $10,000,000.00.

17. As a result of the acts of defendants as aforementioned, plaintiffs are entitled to exemplary damages in the amount of $10,000,000.00.

WHEREFORE, plaintiffs pray damages as follows:

1. For special damages in an amount to be ascertained;

2. For general damages in the amount of $10,000,000.00;

3. For exemplary damages in the amount of $10,000,-000.00;

4. For attorney's fees provided for in California Code of Civil Procedure, Section 836;

5. For costs of suit incurred herein;

6. For prejudgment interest; and

7. For such other and further relief as to the Court may seem just and proper.

DATED: November 15, 1979

HAYES & HUME
A Professional Corporation

By: /s/ Barry B. Langberg
BARRY B. LANGBERG
PAUL S. ABLON
Attorneys for Plaintiffs

EXIBIT [*sic*] "A"

HUSBAND'S BIZARRE BEHAVIOR IS DRIVING SHIRLEY JONES TO DRINK

Shirley Jones' husband, Marty Ingels, is acting like a crazy man—and Shirley has been driven to drink by his bizarre behavior, insiders say.

They also reveal that Ingels—a producer of TV commercials—has terrorized his staff, cheated stars, outraged advertisers and scandalized Hollywood.

Sadly, they charge that it's gotten so bad that Shirley is barely able to make it through the day. And millions of fans of her new TV show, "Shirley," don't realize that the seemingly bubbly star is really crying on the inside.

'By 3 in the Afternoon She's a Crying Drunk'

"Marty Ingels has driven Shirley to drink," charged an inside source who visited the set and spoke with crew members.

"She pours down vodka so fast that at first the crew thought she was drinking water.

"She starts blurring her lines and by 3 o'clock in the afternoon she's a crying drunk and they have to stop shooting."

Shirley—one of the most beloved performers in Hollywood—is hitting the bottle "because of the pressure Marty's putting on her to sign over her home to him and to let him take her teenage son, Patrick Cassidy, into show business," the source told The ENQUIRER.

"Every day Ingels calls her on the set and they have screaming fights over the phone. The other day she was shouting, 'Leave Patrick alone. I want him to go to school and make something of himself—I don't want him to be a teenage idol!' "

Former staffers say Ingels, who brags about owning seven guns, has even gone so far as to threaten them with violence.

"When I argued with him he told me I'd never walk the face of the earth again," confided one frightened former employee. "He told me he was going to blow up my face. Once I even had to call my attorney because I thought he was going to come over and kill me. The guy is a crazy person."

[Photograph Omitted in Printing]

HITTING THE BOOZE: Shirley drinks because of the pressure that husband Marty Ingels—pictured with her here—puts on her, says an insider. "The man is a maniac," says one producer.

Said another: "He still owes me a lot of money. He promises he'll make it up to you—but he never does. Instead, he hires and fires so he won't have to pay."

Though Ingels is only a minor producer of commercials, he has one of the most notorious casting couches in all of Hollywood.

"I was furious to find that I was the victim of a classic casting couch routine," complained one young would-be actress.

"He told me I could have the part in a movie he said he was doing if I would go to bed with him—I told him to go jump in the lake."

Even established stars are beginning to feel as if they, too, have been dragged over the famous couch.

"Steve Allen, Gary Burghoff and Esther Rolle were all going to sue him over appearances in a TV program for the Lutheran Church," recalled one insider. "The church paid Ingels $60,000—but he only passed on $30,000 to the stars."

Shocked and hurt by the obvious rip-off attempt, Allen wrote a personal letter to Ingels which read, in part: "Marty, I can't believe that anybody in the industry—and especially a contemporary—would try to nail three peers in a thing like this." The suit was eventually settled out of court.

Ingels' raging tantrums and foul mouth seem to know no bounds. For example, he once alienated the president of the Pillsbury Co. with a vulgar, four-letter blast over the phone, according to a former associate.

People who have worked closely with Ingels are throwing up their hands in despair.

"The man is sick and he's hurting my industry," fumed producer Lloyd Kolmer. "I try to reason with him but he rants and raves and then sends me threats. The man is a maniac!"

When asked by The ENQUIRER about the charges, Ingels replied: "Of course, none of it is true"—but he admitted that he was "flattered" by all the attention.

—JOHN SOUTH

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

We are the plaintiffs *in the above entitled action or proceeding; I have read the foregoing* COMPLAINT FOR LIBEL; INVASION OF PRIVACY; INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS *and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.*

Executed on November 15th 1979 *at* Beverly Hills, *California.*

I declare, under penalty of perjury, that the foregoing is true and correct.

/s/ Shirley Jones
SHIRLEY JONES

/s/ Marty Ingels
MARTY INGELS

ROGERS & WELLS
261 South Figueroa Street
Los Angeles, California 90012

Telephone: (213) 626-6900

Attorneys for Defendants
JOHN SOUTH and IAIN CALDER

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C 305009

SHIRLEY JONES and MARTY INGELS,
Plaintiffs,

v.

NATIONAL ENQUIRER, INC., *et al.*,
Defendants.

[Filed May 13, 1981]

(1) NOTICE OF MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT

(2) POINTS AND AUTHORITIES AND AFFIDAVITS IN SUPPORT THEREOF

Date: June 2, 1981
Time: 9:00 A.M.
Dept: 80

TO: EACH PARTY AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 2, 1981 at 9:00 A.M., or at such other time as the Court may direct, in

Department 80 of the Los Angeles Superior Court, 111 North Hill Street, Los Angeles, California, defendants John South and Iain Calder, appearing specially for the purpose of this motion only, will move the Court for an order quashing the service of the Summons and Complaint on them.

This motion is made on the ground that the Court lacks personal jurisdiction over defendants.

This motion will be based upon this Notice of Motion, the accompanying Memorandum of Points and Authorities, and Affidavits of John South and Iain Calder, the pleadings and files in the action, and such other material as may be submitted at or prior to the hearing. The original Memorandum and Affidavits in support of this motion were previously filed with this Court for a hearing date of May 18, 1981. At the request of plaintiff's counsel, the motion was re-noticed for June 2, 1981. For the convenience of the Court, copies of the Memorandum and Affidavits are attached hereto.

DATED: May 12, 1981.

ROGERS & WELLS

By: /s/ John F. Karaczynski
Attorneys for Defendants
JOHN SOUTH and IAIN CALDER

AFFIDAVIT OF IAIN CALDER

STATE OF FLORIDA)
) ss.
COUNTY OF)

Iain Calder, first duly sworn, deposes and says:

1. I have personal knowledge of the facts herein stated and if sworn as a witness could testify competently thereto.

2. I am a resident of Florida.

3. I am employed by the National Enquirer, Inc. as President and editor. This is my sole business activity. My place of business is the Enquirer headquarters, located in Lantana, Florida. I do not now have and never had an office or place of business in California.

4. I have never engaged in any other business activity in California or conducted interstate business with California in my personal capacity. I do not now and never have owned assets of any kind in California. I have never obtained credit or had any bank accounts in California.

5. I did not directly participate in the preparation of the Enquirer on the article which is the subject of this lawsuit. In 1979, I performed certain editorial services on behalf of the National Enquirer in connection with the article which is the subject of this lawsuit. During the course of my duties, I was not acting in a personal capacity and did not travel to California. Any editorial services performed in connection with the article took place in Lantana, Florida.

/s/ Iain Calder
IAIN CALDER

Subscribed and sworn to before
me on 20th day of April, 1981.

/s/ [Illegible]
Notary Public in and
for said County and State

Notary Public, State of Florida at Large
My Commisison Expires Dec. 4, 1981
Bonded by American Fire & Casualty Company

AFFIDAVIT OF JOHN SOUTH

STATE OF FLORIDA)
) ss.
COUNTY OF)

John South, first duly sworn, deposes and says:

1. I have personal knowledge of the facts herein stated, and if sworn as a witness could testify competently thereto.

2. I am a resident of Florida.

3. I am employed by the National Enquirer, Inc. as a reporter. This is my sole business activity. My place of business is the Enquirer's national headquarters, located in Lantana, Florida. I do not now have and never have had an office or place of business in California.

4. I have never engaged in any business activity in California in my personal capacity and I have never conducted any business in California or engaged in interstate business with California in my personal capacity. I do not now and never owned assets of any kind in California. I have never obtained credit or had bank accounts in California.

5. In 1979, I performed certain reporting services in Lantana, Florida on behalf of the National Enquirer, Inc. in connection with the article which is the subject of this lawsuit. In the course of my duties, I was not acting in my personal capacity and did not travel to California. All of my services performed in connection with the article took place in Lantana, Florida.

/s/ John South
JOHN SOUTH

Subscribed and sworn to before
me on 29th day of April, 1981.

/s/ Dana Owens Underwood
Notary Public in and
for said County and State

Notary Public, State of Florida at Large
My Commission Expires Dec. 7, 1983
Bonded by American Fire & Casualty Company

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Attorneys for Plaintiffs

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C 305009

SHIRLEY JONES and MARTY INGELS,
Plaintiffs,

vs.

NATIONAL ENQUIRER, *et al.*,
Defendants.

[Filed May 28, 1981]

DECLARATION OF STEPHEN S. MONROE IN SUPPORT OF OPPOSITION TO MOTION TO QUASH SERVICE OF SUMMONS ON JOHN SOUTH AND IAIN CALDER

Date: June 2, 1981
Time: 9:00 a.m.
Dept: 80

DECLARATION OF STEPHEN S. MONROE

I, STEPHEN S. MONROE, declare as follows:

1. I am an attorney duly admitted to practice before all courts of the State of California. I am associated with the law firm of Hayes & Hume, attorneys for the

plaintiffs, Marty Ingels and Shirley Jones, in the subject action. I have personal knowledge of the facts hereinafter stated, and if sworn as a witness, could competently testify thereto.

2. On January 4, 1980, I took the deposition of Iain Calder, the President and Editor of the National Enquirer, in the case of *Carol Burnett vs. National Enquirer*, Los Angeles Superior Court Case No. C 157213. Mr. Paul Selvin of Selvin & Weiner represented the National Enquirer and appeared at the deposition on its behalf and had an opportunity to, and did in fact, cross-examine Mr. Calder. I have reviewed the relevant pages of the transcript of that deposition, true and correct copies of which are attached hereto as Exhibit A and are incorporated herein by reference as though fully set forth at length. Such pages accurately reflect the questions asked and answers given.

3. On Tuesday, June 3, 1980, I took the deposition of Iain Calder at the Palm Beach Hilton Hotel in Palm Beach, Florida. I have examined the relevant pages of the transcript of that deposition, true and correct copies of which are attached hereto as Exhibit B and are incorporated herein by reference as though fully set forth at length. Such pages accurately reflect the questions asked by the questioning attorneys and the responses given by Mr. Calder.

4. On Wednesday, June 4, 1980, at the Palm Beach Hilton Hotel, Palm Beach, Florida, I took the deposition of Mr. John South, a reporter for the National Enquirer. I have examined the relevant pages of the transcript of that deposition, true and correct copies of which are attached hereto as Exhibit C and are incorporated herein by reference as though fully set forth at length. Such pages accurately reflect the questions asked by the questioning attorneys and the responses given by Mr. South.

5. On Thursday, September 11, 1980, I took the deposition of Howard W. Kutz, the Senior Vice President/

Assistant Managing Editor of the Audit Bureau of Circulation, in the matter of *Carol Burnett vs. National Enquirer*, Los Angeles Superior Court Case No. C 157213. In that case, the National Enquirer was a defendant, represented at that time by Selvin & Weiner, Paul Selvin, Esquire. Mr. Selvin appeared at the deposition of Mr. Kutz. The Audit Bureau of Circulation is outside of the State of California and Mr. Kutz does not reside or work in this state. The National Enquirer had every opportunity to cross-examine Mr. Kutz, and in fact over one-third of the transcript reflects questioning by the Enquirer attorneys. In fact, the Enquirer had a greater interest in the cross-examination in that case than this, since there the issue of whether the National Enquirer was a newspaper or magazine was hotly contested. At bar, this issue is not as significant, since not even a purported retraction has ever been published. I have examined the average paid circulation figures for June 30, 1979; December 31, 1979; and June 30, 1980, exhibits to Mr. Kutz' deposition, true and correct copies of which are attached hereto as Exhibit D and are incorporated herein by reference as though fully set forth at length. Such circulation figures are an accurate reproduction of the documents produced.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 27th day of May, 1981, at Beverly Hills, California.

/s/ Stephen S. Monroe
STEPHEN S. MONROE

EXHIBIT A

[EXCERPT FROM DEPOSITION OF IAIN CALDER]

Q. And what position, if any, do you hold with the National Enquirer at the present time?

A. I'm president and editor.

Q. Would it be correct to say there's no one higher in the company except for Mr. Pope?

A. That's correct.

Q. Mr. Pope is the publisher and chairman of the board?

A. That's correct.

Q. And what, if you can recall, was your position in March of 1976?

A. I don't know exactly offhand.

Q. At that particular point in time you were performing editorial functions?

A. Yes.

MR. SELVIN: Off the record.

(Discussion off the record.)

MR. MONROE: Back on the record.

Q. What are your duties now as president, Mr. Calder?

A. As president my duties basically are to oversee just about every function of the Enquirer.

Q. And do you hold any other position now other than president?

A. Yes. I said president and editor.

Q. And editor. Thank you.

What are your functions now as editor?

A. To oversee the whole editorial process.

Q. At this time is it your belief that in March of 1976 you were an editor?

A. Yes. My belief is that I was editor of the National Enquirer.

MR. SELVIN: And I stated before that will be reflected on the masthead of the National Enquirer as of that date.

BY MR. MONROE:

Q. Have the functions of the position of editor changed substantially since 1976?

A. Not substantially.

Q. To the best of your recollection, in what year were you employed, first employed by the National Enquirer?

A. I joined the National Enquirer in its London office about fifteen years ago.

Q. And prior to coming on board with the National Enquirer what was your journalism experience?

A. I had roughly nine years journalism experience before that. I had worked on three weekly newspapers and one daily newspaper.

EXHIBIT B

[EXCERPT FROM DEPOSITION OF IAIN CALDER]

(Whereupon, at this time, Jones-Ingels Notice of Deposition and Request For Production of documents marked Plaintiff's Exhibit Number 1 for identification.

Carol Burnett's Notice of Deposition and Request For Production of documents marked Plaintiff's Exhibit Number 2 for identification.)

THEREUPON,

IAIN CALDER

after being first duly sworn by the undersigned Notary Public, responded as follows:

THE WITNESS: I do.

DIRECT EXAMINATION

BY MR. MONROE:

Q. Mr. Calder, you are still the president of the National Enquirer?

A. Yes, I am.

Q. Have you been employed by the National Enquirer about fifteen years?

A. About fifteen years, yes.

Q. You're familiar with its operations and policy?

A. Yes, I am.

Q. That familiarity is derived from your experience as editor and president; is it not?

A. Yes.

Q. You have had in excess of fifteen years' experience

• • • •

A. Yes, he was.

Q. Let me digress for a moment, Mr. Calder, and ask you in the normal custom, habit and practice that prevailed at the National Enquirer in September and October

of 1979, if someone were to write the Enquirer or telegraph the Enquirer saying a story that they were about to do was libelous, would that matter be brought to your attention?

A. Probably would be.

Q. That would be one of your functions as president and editor to know about those types of things or to acquaint yourself to those types of things, let's put it that way?

A. Not necessarily in every case, but, yes, in general terms. I should know if there was a legal problem, yes.

Q. And based upon your experience in the National Enquirer and your relationship with Mr. Pope, if Mr. Pope receives some written indication in advance of the publication of a story that a subject considered it libelous, would that normally come to your attention?

A. Not initially if he was dealing with it. If he dealt with it to his satisfaction, he wouldn't tell me about it. That wouldn't necessarily tell me about it either.

• • • •

• • • saying pay attention to it. I don't know whether you heard the witness's answer.

BY MR. MONROE:

Q. Someone was communicating to the reporter to pay attention?

A. No. Someone was communicating with someone. I don't know who wrote it and I don't know who did it, so I don't know who was communicating with whom.

Q. Mr. Calder, to your knowledge, have you talked with the source of this material?

A. Not to my knowledge. I don't know who the source was.

Q. You never reviewed any documents which, to your knowledge, contained the name of the source for the story?

A. Not to my knowledge.

Q. To your knowledge, Mr. Calder, have you had any dealings with this particular story prior to publication other than to review the evaluation?

A. Except also to see the final page proof form. I would imagine I saw that. I don't specifically recollect seeing it, but I would have seen it.

Q. Do you have any recollection of ever having read the reporter's copy of the story, Plaintiff's Exhibit Number 9?

A. I didn't read it, no.

• • • •

A. John South. Yes. That says byline.

Q. 21, I'm sorry. In reference to that particular paragraph, Mr. Calder, in October of 1979, was there any policy in force at the National Enquirer to the effect that a celebrity who was to be the subject of an article would be called up in advance of publication and given an opportunity to explain or deny the contents of the proposed article?

A. That would depend on the article, but where possible we would try to give the celebrity a chance to reply in a feature story.

Q. This was a feature story?

A. An article, a feature story, Mr. Monroe, whatever you want to call it.

Q. Would the National Enquirer have published this particular article if they were aware that Mr. Ingels had denied the truth of the article?

The National Enquirer would publish this particular article if they were aware that Mr. Ingels had denied the truth of the article, would they not?

A. You are telling me this?

Q. I'm asking you.

A. I don't know that of my own knowledge.

Q. Would it be true, Mr. Calder, based upon your knowledge and experience of some fourteen or fifteen years with the Enquirer that you would have been responsible in October of 1979, for determining whether a retraction was in order with respect to an article which was claimed to be libelous?

A. Yes.

Q. And in this particular case did you do so?

A. Did I determine it?

Q. Did you make a determination with respect to this particular article?

A. Yes.

Q. Did you determine not to print the retraction; is that not correct?

A. That's correct.

Q. In making that determination, did you listen to any tape recording?

A. No, I didn't.

Q. In making that determination, did you view any documents in the story folder which had not been produced yet today, to your knowledge?

A. No, I didn't.

Q. In making that determination not to retract, were you aware of the name of the source for this particular article?

A. No, I wasn't. I would like to add one thing if I could.

• • • •

Q. If you receive an inquiry concerning the truth or falsity of an article or a story that was at that point in time subject of a libel claim, would that in the normal course be retained by the Enquirer?

A. I can't remember that coming up. The question has never arisen in my estimation.

Q. In your experience?

A. In my experience that I can remember.

Q. Have you ever entertained any opinion personally as to whether or not you believe the allegations in this article to be true, this article meaning Plaintiff's Exhibit 3?

A. I think we stand by the article and as far as I'm concerned the story is true.

Q. Now, have you ever been to California?

A. Yes.

Q. On business for the Enquirer?
A. Yes.
Q. On pleasure?
A. Yes.
Q. About how many times in the last three or four years have you been to California?
A. The last three or four years I think only once.
Q. Was that business?
A. That was pleasure.

• • • •

October of 1979?

A. He had the same responsibility as did I and the managing editor. If he saw something that he felt was wrong, then it's up to him to do something about it, to investigate it further.

Q. In September and October of 1979, was it Mr. Walker's responsibility to review articles on proposed stories?

A. I'm not sure what you mean by review articles.

Q. To read them?

A. Yes, to read them, yes.

Q. In September and October of 1979, was it Mr. Walker's primary purpose or obligation with the National Enquirer to read articles or stories or items and make a recommendation or determination as to whether they would be libelous or invade a person's privacy or otherwise involve some kind of legal complication?

A. That wasn't his primary responsibility. But if he felt from his experience that such a thing should be checked out, then he would in fact check it out. And in fact, if research spotted a potential problem that would need legalling, he would then make sure or he should make sure that it • • •

• • • •

EXHIBIT C

[EXCERPT FROM DEPOSITION OF JOHN SOUTH]

* * * have been sitting about twenty yards away in the reporter's section. And the conversation would have taken place either at his desk or mine.

Q. All right. And do you recall what it was he said to you at that time?

A. I believe he said we have this lead in on Shirley Jones and Marty Ingels and I would like you to handle it.

Q. Is that all that you can remember him saying to you during that conversation?

A. Yes.

Q. Do you remember what you said to him during that conversation?

A. Okay.

Q. Did he physically hand you the lead sheet?

A. Yes.

Q. At the time he handed you the lead sheet did he give you any other material?

A. I believe he did.

Q. What other material was that, if you know?

A. I believe it was a transcript of interviews already done.

Q. One or more transcripts, if you know?

A. To the best of my recollection, it was one, one transcript.

• • • •

Based upon your experience as a reporter and senior reporter at the Enquirer and based upon your knowledge with respect to the prevailing custom, habit and practices of the Enquirer in August, September and October of 1979, would there at any time during the life of a story file be in existence one or more documents that would inventory its contents or contain a list of its contents?

A. I don't know.

Q. Have you ever met Robert John Lucas face-to-face?

A. Yes.

Q. I'm sorry, it's John Robert Lucas, is it not?

A. John Robert Lucas.

Q. You have met him face-to-face?

A. Yes, sir.

Q. Do you know if he goes by the name of Bob or Bobby?

A. I know him as Bobby Lucas.

Q. To your knowledge, has Mr. Lucas ever been back to Lantana, Florida?

A. Not to my knowledge.

Q. And when I say to your knowledge, Mr. South, I mean not only have you seen but has anyone told you? Did you understand the question in that way?

A. No one has told me and I have not seen him.

Q. I take it then that any meeting that you had with him would have been in California?

A. Yes.

Q. Let us digress if we may for a moment.

As a reporter for the Enquirer, Mr. South, have you been required to go on trips?

A. Yes.

Q. And have any of those trips been to Califoria?

A. Yes.

Q. About how many trips to California say over the last four years preceding the October 9, 1979 publication date of this article, did you take?

A. Many.

Q. When you say "Many," more than ten?

A. Yes.

Q. More than twenty?

A. Over four years I would think so.

Q. Can you give any estimate as to the number of trips?

A. No.

Q. Say within the closest ten?

A. I really couldn't say. It's certainly more than twenty.

Q. All of those trips were on Enquirer business?

A. Correct.

Q. And during that period of time, Mr. South, four years preceding the publication of this article, can you give me an estimate of the total number of days that you remained in California overnight for those trips?

A. No.

Q. Can you give me any estimate as to the average length of a business trip for the Enquirer to California?

A. One to two weeks.

Q. Do you have personal or social friends in California?

A. Yes.

MR. MONROE: Off the record.

(Discussion held off the record.)

MR. MONROE: Let's go back on the record.

BY MR. MONROE:

Q. Can you give me an estimate, Mr. South, approximately how many friends and business acquaintances you have in California at the present time?

MR. MASTERSON: This is friends and business acquaintances? Can't you break it down, Mr. Monroe?

MR. MONROE: Okay.

BY MR. MONROE:

Q. When I say business acquaintances, I mean anyone not related to the business of the National Enquirer?

Does that help break it down a little bit?

A. Not related to the business of the Enquirer? I'd say a dozen.

Q. And how many business acquaintances do you have in California at the present time, Mr. South, who are related in some way to the business of the National Enquirer?

A. At this time?

Q. Sure.

A. I'd estimate about twenty.

Q. Would those figures have been about the same or to your knowledge more or less in October of 1979?

A. I think about the same.

Q. Mr. South, do you own any real or personal property at the present time in the State of California?

A. No.

Q. Have you at any time within four years preceding the publication of this article owned any real or personal property situated in California?

A. No.

Q. Have you at any time within the four years preceding the publication of the article in question been employed by any California company or sought employment with any California company?

A. No.

Q. How many times, if you can recall, did you meet Bobby Lucas in California while on Enquirer business?

A. I would estimate half a dozen.

Q. And what time period did those meetings cover; that is, from approximately when to approximately when?

A. I would say within the past year.

Q. Were any of those meetings prior to the date of publication on the subject article, Mr. South, meaning the Jones-Ingels article?

A. Yes.

Q. How many?

A. I would think two.

Q. Were those meetings related to one or more than one story?

A. Were all meetings related to one or more stories?

Q. I'm sorry, I didn't make the question clear. Of the two meetings that occurred in Califonia prior to the subject article being published, were those meetings related to one story or to more than one story?

A. I believe to more than one.

Q. My next question is, Bill, were any of those meetings related to the potential publication of the Shirley Jones-Marty Ingels article?

MR. MASTERSON: I'm going to construe the question as were those meetings for Jones-Ingels article, I'm going to object on the source, on the constitutional grounds previously referenced and instruct the witness not to answer.

MR. MONROE: The same objection and same instruction is fine.

MR. MASTERSON: Thank you.

BY MR. MONROE:

Q. Mr. South, at any time while you were in California prior to the publication—let me withdraw that.

At any time while you were in California prior to the publication of the Shirley Jones-Marty Ingels article, did you speak with Bobby Lucas about doing any writing for the Enquirer?

A. Yes.

Q. Was that conversation to which you just referred in connection with one article or one or more articles or no articles?

A. No specific articles.

Q. Was that the first or the second conversation of the two that took place prior to October 9, 1979?

A. I would think the first.

Q. And do you happen to have a recollection of the date of the first meeting?

A. No, I don't.

Q. Do you happen to have a recollection of the month in which it occurred?

A. I believe that I spoke first to Bobby Lucas about a year ago, but I can't remember whether it was in person or by telephone and I can't remember exactly when I met him personally. I had about six meetings with him and many telephone conversations in the past year.

Q. About how many telephone conversations in the past year, if you can recall? Bill, not your best number, but your best estimate.

A. Let's make it around fifty.

Q. Fifty?

A. Yes.

Q. Did any of those phone conversations occur prior to the publication of the Shirley Jones-Marty Ingels article?

A. Yes.

Q. And please give your best estimate as about how many of those occurred prior to the publication of the Jones-Ingels article?

A. I would estimate around 20, 25.

Q. Were you introduced to Bobby Lucas through Jane Chesis?

A. Yes.

Q. And did you first hear his name from her?

A. Yes.

Q. When, if you can recall, did that first conversation in which Mr. Lucas' name was mentioned occur?

A. I believe about a year ago.

Q. And was that a telephone conversation?

A. I believe it was.

Q. And I wonder if you would relate to me as best as you can what was said during that conversation?

A. As I remember it, Mr. Monroe, that he was a free-lance journalist covering the Hollywood scene. That Jane Chesis told me that he was a free-lance journalist covering the Hollywood scene. That Jane Chesis told me that he was a free-lance journalist covering the Hollywood scene; that he moved around in Hollywood circles and that he met regularly with actors, producers, show biz agents, publicity people, studio personnel and musicians and that he attended parties which show biz people attended and that he would be a very useful contact for me to meet and that he was extremely reliable.

Q. Insofar as she was aware?

A. As far as she was aware, yes.

Q. Now, first of all, when you use the words "Hollywood scene," were those Jane's words or was that your characterization of the substance?

A. That's what I refer to, to the Hollywood scene • • •

EXHIBIT D

• • • •

NATIONAL ENQUIRER
LANTANA, FLORIDA 33464

[ABC Emblem]

MAGAZINE PUBLISHER'S STATEMENT

Average Paid Circulation
For Six Months Ended December 31, 1979
5,024,180

Publisher's Compilation—Subject to Audit

AUDIT BUREAU OF CIRCULATIONS
123 North Wacker Drive—Chicago, Illinois 60606

NATIONAL ENQUIRER
Publisher's Statement
For 6 Months Ended
December 31, 1979

NAME OF PUBLICATION

CLASS, INDUSTRY OR FIELD SERVED: General

1. AVERAGE PAID CIRCULATION FOR 6 MONTHS ENDED DECEMBER 31, 1979:

Subscriptions:		486,064
Single Copy Sales:		4,538,116
AVERAGE TOTAL PAID CIRCULATION		5,024,180
Average Total Non-Paid Distribution	3,311	

1a. AVERAGE PAID CIRCULATION of Regional, Metro & Demographic editions.

2. PAID CIRCULATION (Total of subscriptions and single copy sales) BY ISSUES:

Issue			Issue			Issue		
July	3	4,811,219	Sept.	4	5,163,720	Nov.	6	5,310,646
	10	5,085,840		11	4,893,910		13	5,285,454
	17	4,857,238		18	5,292,200		20	5,371,742
	24	4,880,083		25	4,898,400		27	5,255,412
	31	4,895,327						
Aug.	7	4,787,240	Oct.	2	5,189,181	Dec.	4	5,176,904
	14	4,685,630		9	4,749,357		11	5,271,194
	21	4,851,454		16	4,940,969		18	5,283,375
	28	4,356,172		23	5,161,861		25	5,037,412
				30	5,136,751			

3. U.S. PAID CIRCULATION BY ABCD COUNTY SIZE:

Advertising content (exclusive of mail order and house advertising) being less than 10% of total content, answer to this paragraph is not required.

4. GEOGRAPHIC ANALYSIS OF TOTAL PAID CIRCULATION FOR THE SEPTEMBER 18, 1979 ISSUE:

Total paid circulation of this issue was 5.33% greater than average total paid circulation for period. Subscriptions and Single Copy Sales figures are based on the percentage for each State Province determined by analysis of February 6, 1979 issue and these percentages are projected against the total for September 18, 1979 issue.

STATE	Subs.	Single Copy Sales	TOTAL	%
Maine	1,858	22,883	24,741	
New Hampshire	1,288	18,686	19,974	
Vermont	704	8,561	9,265	
Massachusetts	7,409	137,147	144,556	
Rhode Island	1,144	21,530	22,674	
Connecticut	3,945	64,020	67,965	
NEW ENGLAND	16,348	272,827	289,175	5.46
New York	19,147	297,764	316,911	
New Jersey	8,588	115,773	124,361	
Pennsylvania	20,722	268,959	289,681	
MIDDLE ATLANTIC	48,457	682,496	730,953	13.81
Ohio	22,179	200,776	222,955	
Indiana	11,640	98,130	109,770	
Illinois	27,406	219,012	246,418	
Michigan	18,272	161,399	179,671	
Wisconsin	16,704	84,665	101,369	
EAST NO. CENTRAL	96,201	763,982	860,183	16.25
Minnesota	14,874	90,690	105,564	
Iowa	10,355	45,213	55,568	
Missouri	16,705	68,359	85,064	
North Dakota	3,291	12,424	15,715	
South Dakota	3,425	14,047	17,472	
Nebraska	6,709	30,219	36,928	
Kansas	7,877	61,488	69,365	
WEST NO. CENTRAL	63,236	322,440	385,676	7.29
Delaware	740	10,174	10,914	
Maryland	5,933	61,293	67,226	
District of Columbia	1,413	18,459	19,872	
Virginia	8,351	85,941	94,292	
West Virginia	4,646	45,600	50,246	
North Carolina	8,263	97,564	105,827	
South Carolina	4,173	56,025	60,198	
Georgia	7,153	88,675	95,828	
Florida	31,333	262,247	293,580	
SOUTH ATLANTIC	72,005	725,978	797,983	15.08

STATE	Subs.	Single Copy Sales	TOTAL	%
Kentucky	7,476	66,535	74,011	
Tennessee	7,866	83,401	91,267	
Alabama	5,938	66,606	72,544	
Mississippi	3,183	28,060	31,243	
EAST SO. CENTRAL	24,463	244,602	269,065	5.08
Arkansas	5,588	49,145	54,733	
Louisiana	6,464	61,738	68,202	
Oklahoma	8,626	78,352	86,978	
Texas	22,527	223,499	246,026	
WEST SO. CENTRAL	43,205	412,734	455,939	8.62
Montana	3,279	21,716	24,995	
Idaho	2,856	18,935	21,791	
Wyoming	1,700	11,455	13,155	
Colorado	8,244	62,861	71,105	
New Mexico	2,492	28,859	31,351	
Arizona	6,524	64,711	71,235	
Utah	2,427	25,623	28,050	
Nevada	2,228	30,266	32,494	
MOUNTAIN	29,750	264,426	294,176	5.56
Alaska	862	5,672	6,534	
Washington	12,627	87,889	100,516	
Oregon	6,991	99,497	106,488	
California	59,726	544,705	604,431	
Hawaii	1,366	14,583	15,949	
PACIFIC	81,572	752,346	833,918	15.76
Unclassified				
Miscellaneous				
UNITED STATES	475,237	4,441,831	4,917,068	92.91
Possessions & Other Areas	734	7,069	7,803	0.15
U.S. & POSSESSIONS, etc.	475,971	4,448,900	4,924,871	93.06

	Subs.	Single Copy Sales	TOTAL	%
Canada	7,162	349,177	356,339	6.73
Newfoundland	132	3,726	3,858	1.08
Nova Scotia	417	27,960	28,377	7.96
Prince Edward Island	61	2,238	2,299	0.65
New Brunswick	225	15,021	15,246	4.28
Quebec	482	20,134	20,616	5.79
Ontario	2,593	183,186	185,779	52.14
Manitoba	652	18,989	19,641	5.51
Saskatchewan	975	11,214	12,189	3.42
Alberta	462	15,018	15,480	4.34
British Columbia	1,147	51,691	52,838	14.83
Northwest Territories	10		10	0.00
Yukon Territory	6		6	0.00
CANADA	7,162	349,177	356,339	100.00
Foreign	1,004	3,818	4,822	0.09
Unclassified				
Military or Civilian Personnel Overseas	598	5,570	6,168	0.12
GRAND TOTAL	484,735	4,807,465	5,292,200	100.00

ANALYSIS OF THE TOTAL NEW AND RENEWAL SUBSCRIPTIONS

Sold During 6 Months Period Ended December 31, 1979

5. AUTHORIZED PRICES and total subscriptions sold:	
(a) Basic Prices: Single Copy United States 40¢; Canada 40¢ to July 31, 1979 thereafter 45¢ Subscriptions: 6 mos. $6.48, 1 yr. $12.95	232,579
(b) Higher than basic prices: Canada 1 yr. $14.95. Foreign, 1 yr. $17.00	
(c) Lower than basic prices: 20 weeks $3.95, $4.95, 1 yr. $8.95, $9.95	58,460
(d) Association subscription prices:	None
Total Subscriptions Sold in Period	291,039
6. DURATION OF SUBSCRIPTIONS SOLD:	
(a) For five years or more	None
(b) For three to five years	None
(c) For one to three years	232,181
(d) For less than one year	58,858
Total Subscriptions Sold in Period	291,039
7. CHANNELS OF SUBSCRIPTION SALES:	
(a) Ordered by maid and/or direct request	291,039
(b) Ordered through salesmen:	
1. Catalog agencies and individual agents	None
2. Publisher's own and other publisher's salesmen	None
3. Independent agencies' salesmen	None
4. Newspaper agencies	None
5. Members of schools, churches, fraternal and similar organizations	None
(c) Association memberships	None
(d) All other channels	None
Total Subscriptions Sold in Period	291,039
8. USE OF PREMIUMS:	
(a) Ordered without premium	291,039
(b) Ordered with material reprinted from this publication	None
(c) Ordered with other premiums	None
Total Subscriptions Sold in Period	291,039

ADDITIONAL CIRCULATION INFORMATION

9. ARREARS AND EXTENSIONS: Average number included in PAID (Par. 1) which represents:

   (a) Average number of copies served on subscriptions carried in arrears not more than three months — None

10. COLLECTION STIMULANTS: — None

11. BASIS ON WHICH COPIES WERE SOLD TO RETAIL OUTLETS:

    Fully returnable — 100.00%

12. EXPLANATORY:

    Latest Released Audit Report Issued for 12 months ended June 30, 1978.

We hereby certify that all statements set forth in this statement are true.

04-0745-0

NATIONAL ENQUIRER, published by, National Enquirer, Inc., Lantana, Florida 33464.

JAMES E. NOLTE
Circulation Manager

J. RICHARD ALLISON
Secretary

Date Signed, January 18, 1980.

* * * *

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A Professional Corporation
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Beverly Hills, California 90212
Telephone (213) 858-2050

Attorneys for Plaintiffs

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C 305009

SHIRLEY JONES and MARTY INGELS,
Plaintiffs,

vs.

NATIONAL ENQUIRER, INC., *et al.*,
Defendants.

[Filed May 28, 1981]

DECLARATION OF PAUL S. ABLON IN SUPPORT OF OPPOSITION TO MOTION TO QUASH SERVICE OF SUMMONS ON JOHN SOUTH AND IAIN CALDER

Date: June 2, 1981
Time: 9:00 a.m.
Dept: 80

DECLARATION OF PAUL S. ABLON

I, PAUL S. ABLON, declare as follows:

1. I am an attorney duly admitted to practice before all courts of the State of California. I am an associate with the law firm of Hayes & Hume, attorneys of record

for the plaintiffs in this matter. I have personal knowledge of the facts hereinafter stated, and if sworn as a witness, could competently testify thereto.

2. On April 22, 1980, I took the first of four sessions of the deposition of Dayzhun Jane Chesis, at the law offices of Hayes & Hume, which session of the Chesis deposition is contained at pp. 4 through 95 of the written transcript. The deposition was not completed at that time, but was continued to a later date. I have examined the relevant pages of the transcript of this first session of Mrs. Chesis' deposition, true and correct copies of which are attached hereto as Exhibit A and are incorporated herein by reference as though fully set forth at length. Such pages accurately reflect the questions asked by the questioning attorney and the responses given by the deponent.

3. On May 20, 1980, I took the second session of the deposition of Mrs. Chesis at the offices of Hayes & Hume, which session of the Chesis deposition is contained at pp. 96 through 153 of the written transcript. I have examined the relevant pages of the transcript of this second session of the Chesis deposition, true and correct copies of which are attached hereto as Exhibit B and are incorporated herein by reference as though fully set forth at length. Such pages accurately reflect the questions asked by the questioning attorney and the responses given by Mrs. Chesis.

4. On May 22, 1980, the third session of the deposition of Mrs. Chesis was taken. The transcript of the third session of Mrs. Chesis' deposition is contained at pp. 154 through 243 of the written transcript. I have examined the relevant pages of this session of the Chesis deposition, true ond correct copies of which are attached hereto as Exhibit C and are incorporated herein by reference as though fully set forth at length. Such pages accurately reflect the questions asked and the responses given.

5. On July 3, 1980, the deposition of Mrs. Chesis was finally concluded. The fourth session of Mrs. Chesis' deposition is contained in the written transcript at pp. 244 through 351. I have examined the relevant pages of this portion of Mrs. Chesis' deposition, true and correct copies of which are attached hereto as Exhibit D and are incorporated herein by reference as though fully set forth at length. Such pages accurately reflect the questions asked and the responses given by the deponent.

6. The law firm of Hayes & Hume represents Carol Burnett in her lawsuit against the National Enquirer, Los Angeles Superior Court Case No. C 157213. I was one of the attorneys present in court for nearly the entire duration of the *Burnett* trial and during the testimony of Iain Calder on March 16, 1981. This matter commenced trial on March 9, 1981, and a jury verdict was obtained on March 26, 1981. A true and correct copy of the relevant testimony of Mr. Calder given therein is attached hereto as Exhibit E and incorporated herein by reference as though fully set forth at length. I have reviewed this transcript, which accurately reflects the questions asked and the answers given at that time.

7. During the course of the *Burnett* trial, I observed that Mr. Calder was present in the courtroom for virtually the entire duration of the trial. Further, Mr. Calder, a defendant in the *Burnett* lawsuit, at no time during the course of those proceedings made any motion to quash or otherwise challenge jurisdiction or claim inconvenience in defending that lawsuit in California. In connection with my work on the *Burnett* lawsuit, I personally became aware that there were several depositions taken in California of National Enquirer employees who are residents of Florida. These depositions included the deposition of Paul Jenkins, Steven Tinney, and Hayden Cameron. (Though at the time of their depositions Jenkins and Tinney had ceased working for the National Enquirer, arrangements for their depositions were

made through National Enquirer attorneys.) Thus, employees of the National Enquirer had no great difficulty appearing in California when necessary in connection with ongoing litigation.

8. Included in the statement of facts herein is a true copy of the subject article that appeared in the National Enquirer of October 9, 1979. The authenticity of this article was admitted in the answer filed by the defendant, National Enquirer, in this action.

9. The address given by Mrs. Jane Chesis in her deposition of 8440 West Sunset Boulevard is located in Los Angeles, California. I have had occasion to serve various subpoenas on Mrs. Chesis at that address, and found her to reside therein.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 27th day of May, 1981, at Beverly Hills, California.

/s/ Paul S. Ablon
PAUL S. ABLON

EXHIBIT A

[DEPOSITION OF DAYZHUN JANE CHESIS]

* * * *

* * * the costs that you may be subjected to—

A. I do not.

Q. —if we are forced to go to court to compel your answers?

A. I do not.

Q. Has that subject been discussed—

A. No.

Q. —with any attorney or with any law firm that you may have discussed this case or any other case with in the past?

A. It has not.

Q. Let me finish my questions, if I might. Prior to your deposition today, have you had any conversations with any person who is employed or was employed by the "National Enquirer" relating to this deposition?

A. Yes.

Q. Tell me who that was.

A. John South.

Q. When did you have this discussion with Mr. South?

A. About a week ago.

Q. Was this a face-to-face discussion—

A. It was.

Q. —or telephone? Where did this discussion take place?

A. Schwab's drug store.

Q. Which is located where?

A. In Los Angeles on Sunset Boulevard.

Q. Was anyone else present at that conversation other than the people that were just in Schwab's and other than yourself and Mr. South?

A. There was not.

Q. Who called for this meeting?

A. We went to breakfast. It wasn't a meeting.

Q. What was the nature of your discussion with Mr. South concerning this deposition?

A. He asked if I had given it yet.

Q. Anything else?

A. No.

Q. Were there any other discussions concerning this case or this deposition at that time?

A. No. We were discussing his vacation and suntan and his loss of weight.

Q. I'm sorry. I may have missed something. When did you say this meeting took place?

A. About a week ago.

Q. About a week ago. Was anything else discussed that is relevant to this lawsuit or to this deposition?

A. Nothing.

Q. Were there any discussions between yourself and Mr. South concerning the "National Enquirer"?

A. No. We never discuss his work or the paper. We make that a rule.

Q. Had you had any discussions prior to that meeting last week with Mr. South concerning this deposition?

A. Yes.

Q. Do you recall relative to that meeting of last week when those prior discussions were or that prior discussion was?

A. January 9th.

Q. Was that a face-to-face meeting or—

A. It was.

Q. Where did that discussion take place?

A. The Hillcrest Hotel.

Q. What was the nature of the discussion germane to the deposition or the case at that time?

A. Merely that I had met you and had a discussion with you.

Q. Anything else relating to this lawsuit or the deposition?

A. No.

Q. Between January 9th, 1980, and the meeting of last week with Mr. South, did you have any other meetings or phone conversations with him?

A. Many times. We're friends.

Q. Any other meetings or phone conversations of which this lawsuit or your deposition was the subject?

A. I called him and told him I had been served.

Q. Where did you call him?

A. In Florida.

Q. Why did you call him to tell him that?

A. I felt I owed it to him. John and I are friends, as I said prior.

Q. Did he ask to be notified of what happened in connection with this lawsuit?

A. No.

Q. At the time that you called him to tell him that you had been served, did you at all discuss the deposition or the lawsuit?

A. Yes.

Q. Can you tell me what the substance of that discussion was?

A. I suggested he get hold of Thom Keith, T-h-o-m K-e-i-t-h, who was then recovering from a heart attack.

Q. What was the purpose that you suggested that this occur?

A. Mr. South had intervewed Mr. Keith pertinent to the Marty Ingels story which appeared in the "Enquirer," and even though the information given by Mr. Keith—who at one time lived with Marty Ingels—concerning Mr. Ingels' desire to marry a wealthy woman and making a list of women to marry, starting with Doris Day—Shirley Jones was second on the list—that even though he had it on tape, it might be wise for his protection to have a deposition, since Mr. Keith had been told to cease drinking and had not.

Q. What was Mr. South's response to your suggestion?

A. He would contact the attorneys.

Q. Which attorneys are those?

A. He didn't say, and I didn't ask. I just assumed they were the "National Enquirer" attorneys.

Q. Was there anything else in that conversation relative to your deposition or the lawsuit?

A. Not that I recall.

Q. Any other conversations with Mr. South relative to the lawsuit or your deposition other than, I believe, the three that you have alluded to?

A. We've had others where I said I cannot understand why—I think it's foolish, a waste of time, a waste of money, since anything I may know is strictly hearsay, which is not admissible as evidence, and knowing Mr. Ingels' reputation throughout Hollywood and the theatrical world—why he would want to force me to give a deposition which will only be harmful to him and not beneficial in any way, because whatever I know would merely back up the "Enquirer's" allegations.

MR. ABLON: I'm going to move to strike that answer on the grounds that it's nonresponsive.

Q. Did you make any of those statements to Mr. South in a conversation?

A. I did.

Q. Was it in one of the conversations to which you have previously alluded?

A. No. It was in others, the two or three others that we have had, because it has always puzzled me.

Q. Has anyone at the "Enquirer" offered to pay for your time or any costs that you may incur for refusing to respond to any question at this deposition?

A. They have not. Nor would I expect them to.

Q. Have you had any conversations with anyone else at the "National Enquirer" other than Mr. South concerning your deposition or the subject of this lawsuit?

A. I have not. Mr. Ablon, could I have a glass of water?

MR. ABLON: Sure can.

• • • •

Q. Do you recall the approximate time—

A. No.

Q. Do you recall how long you were in prison during each of these occasions?

A. No.

Q. Was it a month? A week? Very roughly.

A. I don't remember.

Q. You have no recollection of that?

A. If it was necessary due to the work, sometimes they got me out on bond. Sometimes they left me in there to obtain whatever they wanted. I don't know how to answer these questions, really. And if I had known you were going to get into this, I would have brought a federal attorney with me.

Q. I am asking you specifically about the two times.

A. I do not recall.

Q. You have no recollection as to whether you were in prison for two days or two years?

A. I don't recall—I know I wasn't there for two years.

Q. Was it less than a month on each occasion?

A. I don't remember.

Q. Can you please tell me your current residence address?

A. My legal address is 8440 West Sunset Boulevard.

Q. Is that an apartment building?

A. It is.

Q. Do you have an apartment number?

A. 1111.

• • • •

Q. What was your job function there?

A. I created a television concept, which was optioned by ABC and died along with Mr. Sharp.

Q. What was the name of that concept?

A. It had a working number, no title.

Q. So you were basically in that position a writer?

A. That's stretching it a point.

Q. After Mr. Sharp's death in November of 1975, what did you next do?

A. I refused to work for anybody, put a concept of a film together, and went to G. David Schein with it.

Q. What was Mr. Schein's response to your concept?

A. It was produced.

Q. What was the name of the film?

A. "That's Action."

Q. Was it a theatrical film or a—

A. It was.

Q. How about after the completion of that particular project? Were you working, by the way, when you were working on that film? Were you currently working on any other films or writing projects?

A. No. I had two concepts going, which didn't sell. After that I did some stringing for the "National Enquirer."

Q. When you say "after that," what time period are we talking about when you first began that?

A. The fall of '77. It would be the fall of '77.

Q. You used the term "stringing" for the "National Enquirer." Could you define what you mean by that term?

A. I would give them leads for stories. If the reporters involved with the "Enquirer"—if the lead was approved and they subsequently did a story, then I was paid a lead fee.

Q. How did you initially make contact with the "National Enquirer" to engage in this kind of work?

A. I put together an award show for a film society—of which Mr. Ingels, incidentally, emceed—and I was approached by one of their employees, a Mr. Don Monte, to give them gossip, which I didn't do, because I wouldn't know gossip if it hit me at that time.

Q. Mr. Monte was an employee of the "Enquirer"?

A. He was and still is.

Q. Do you know what his title or position is with the "Enquirer"?

A. He works for the gossip column. I don't know what his title is.

Q. Is he a writer?

A. I don't know.

Q. Does he reside in California, or does he reside in—

A. Someplace in Los Angeles.

Q. What was the name of this award show, if you can recall?

A. The Bijou National Film Society Awards Show, Labor Day weekend of '77.

Q. How long did you continue acting as a stringer for the "National Enquirer"?

A. That's all I ever was for the "National Enquirer."

Q. How long did you—

A. Up until October of '79. About two years.

Q. To your recollection, approximately how many articles that were published in the "National Enquirer" were you involved in to one degree or another as a stringer?

A. You've got to be kidding. I have no idea.

Q. I take it from that that there were a substantial number.

A. Yes.

Q. Do you recall the remuneration that you received for your activities on behalf of the "National Enquirer"?

A. $2,000, 1977. Approximately $11,500 for '78. Approximately between $25,000 and $26,000 for '79. And around $2500 for 1980. Though I no longer string for them, you are paid upon publication, which gives you the reason for the 1980 figure.

Q. Can you tell me the method by which you were paid, in terms of did you receive a retainer of some sort, or were you paid on an as-you-produce basis?

A. You are paid upon publication by check.

Q. Do you recall the amount that you initially received for a publication that you acted as a stringer on?

A. You mean break it down into stories?

Q. Well, did you receive the same amount for everything you did?

A. No.

Q. How was the amount determined that you would receive for stringing on a particular article?

A. It would depend upon the involvement with the article. Such as I do recall one. I went down to the county jail and interviewed Evel Knievel in jail. I was paid $250 for the lead fee and $500 for the interview and traipsing back and forth trying to catch him as they were transferring him from facility to facility.

MR. MONROE: Did he show you the baseball bat?

THE WITNESS: He didn't have it, but he had on a gorgeous brown outfit, which I later found out was the one—

MR. MASTERSON: Can we keep down the distractions during the depo, Mr. Monroe? I would really like to get out of here some year.

MR. MONROE: I didn't mean to offend you, Mr. Masterson. I just thought that it was a humorous situation.

MR. MASTERSON: It certainly didn't offend me.

Q. BY MR. ABLON: Was this fee for the lead you indicated in the Knievel story—did you say the lead fee was $250?

A. That's right.

Q. Was that a standard fee that you would receive, generally speaking?

A. That is standard. For any top story, it's $250. For a down story, it's $125. Bottom of the page is $125, and top of the page is $250.

Q. Did you do any actual writing of articles?

A. I did not.

Q. You seem pleased that you did not. Can I ask you why?

A. Because I never wrote anything for the "National Enquirer." I didn't start writing until I went with some other publications.

Q. Are you familiar with the existence of several lawsuits currently pending against the "National Enquirer"?

A. I have heard of a few of them.

Q. Can you tell me the ones that you are familiar with?

A. The Carol Burnett. It's been in the papers.

Q. All right.

A. Rory Calhoun.

Q. Okay.

A. The Marty Ingels. Paul Lynde. I know there are others, but I don't recall which ones.

Q. Of the four you just mentioned, did you act as a stringer on any of those?

A. I did not.

Q. Did you have any involvement whatsoever in connection with the preparation, publication, investigation, corroboration of any of the articles that are the subject of those lawsuits?

A. I did not.

Mr. Ablon, could I ask him a question off the record?

MR. ABLON: Go right ahead.

(Whereupon, the witness and Mr. Masterson conferred.)

MR. ABLON: Would the reporter just reflect that there's a conference.

THE WITNESS: We can get back on the record now. I gave John South five telephone numbers for people he wanted to talk with on Marty Ingels.

Q. BY MR. ABLON: When approximately did you give him these five numbers?

A. August or September of '79.

Q. Do you recall the names of the individuals whose numbers you gave him?

A. Marty Ingels.

Q. Any others?

A. The 876-9550 number, his office number. The one at the home. Levita Smith; that's Manhattan Beach numbers.

Q. I'm sorry? I didn't hear you. What was that?

A. Levita Smith. She formerly was Mr. Ingels' secretary. Those numbers were defunct. Thom Keith; a Valley number, which is no longer any good now. I know I gave him five phone numbers, because they paid me $50, but I don't remember who the other one was.

Q. You have omitted—

A. It may have been someone I got from Celebrity Service for him.

Q. You may have omitted from your list of pending lawsuits a lawsuit by Mr. Phil Silvers and Mr. Ed Mc Mahon against the "National Enquirer." Are you aware of the pendency of those lawsuits?

A. I probably have heard but just forgot about them.

Q. Did you have any involvement in either of those?

A. No, no involvement. None of the stories that I worked on, other than the five numbers to Mr. South, have been involved in any legal.

• • • •

Q. Does all the printing occur in Montreal?

A. I don't know where they print it. I wouldn't imagine so.

Q. As a matter of course, you prepare the column and then send it to Canada for—

A. No. I take it to the local office here and turn it in to the editor here.

Q. For what period of time have you been the person exclusively responsible for this gossip column?

A. 14 weeks. I've turned in 14 columns.

Q. Prior to this 14-week period, I take it you have had no ongoing responsibility for this of any other column in that publication—

A. No.

Q. —or in any other publication. Do you know if there is any relationship between the "Midnight Globe" and "The Star"?

A. There is not.

Q. Is there any relationship between either of those publications and the "National Enquirer," to your knowledge?

A. There is not. They are competitors.

Q. To your recollection, what is the last article that you did any work on that was published by the "National Enquirer"?

A. "The Happy Marriage of Vic and Sheila Tayback." That was the story lead.

Q. When you were doing work for the "National Enquirer," who or what employee of the "National Enquirer" did you have the most direct contact with concerning the work you were doing?

A. Over what period?

Q. Over the last period that you were there.

A. John South.

Q. Do you know Mr. South's position or function within the "National Enquirer"?

A. He's a senior reporter.

Q. Do you recall approximately when your dealings with Mr. South commenced?

A. I do, indeed. December of 1978.

Q. Who was it that you were dealing with prior to dealing with Mr. South?

A. Tony Brenna, B-r-e-n-n-a.

Q. Do you recall approximately what period of time you were dealing predominantly with Mr. Brenna?

A. I worked exclusively with Tony from October of '77 until November of '78.

Q. Was October of '77 approximately when you first began—

A. It is.

Q. —doing work for the "National Enquirer"?

A. It is.

Q. Over the course of your dealing with the "Enquirer" for roughly a two-year period, were there any other individuals or employees of the "Enquirer" with whom you had dealings on a less regular basis?

A. Yes.

Q. Can you tell me who they would be?

• • • •

A. In the beginning I dealt with Mr. McLachlan. I never could understand Mr. Parmiter, so it was just easier to deal with Mr. South than it was with Mr. Parmiter.

Q. Can you tell me what your understanding was or is of the function or what Mr. South did after he received your lead?

A. Mr. South is a reporter. He would type it up and turn it in. If it was approved, he would call me back and say it was approved. I'd say, "Fine. Call this one and this one and this one and this one. It happened here or happened there," whatever.

Q. Let me just change the topic for a second while I have a thought in my mind. Have you since you began running or being primarily responsible for this gossip column in the "Globe," have you done any writing, any free-lancing, for anyone else?

A. No.

Q. You did testify, though, that you are, under the terms of your arrangement with the "Globe," free to do that if you so choose—

A. I am.

Q. —Is that correct?

A. Yes.

Q. When you say that Mr. South submitted the lead for approval—I believe that's in substance what you have testified to. Is that correct?

A. That's correct.

Q. Who were the people responsible for giving this • • •

• • • •

A. I don't think he roved.

Q. You indicated, I believe, that he is no longer with the "Enquirer"—

A. That's correct.

Q. —To your knowledge?

A. Correct.

Q. Do you know where he is?

A. Florida.

Q. Do you know what Mr. McLachlan is doing in Florida currently?

A. Free-lancing.

Q. Is that for the "National Enquirer," to your knowledge?

A. No. I believe it's for British and German publications. I don't really know.

Q. Do you have any knowledge as to why Mr. McLachlan departed working for the "Enquirer"?

A. I do not. We might save some time if I tell you this: I have no knowledge why anybody stopped working for the "Enquirer."

Q. You previously, I think, also referred to two other gentlemen whose names are Mr. Jenkins and Mr. Gregor.

A. Gregor.

Q. Do you know whether they are personal friends of Mr. Hay?

A. No, I don't.

Q. Do you know whether Mr. South does any writing of articles for the "Enquirer"?

A. He writes them, and then, it's my understanding, they are turned over to research and then to a writer for finalizing, like a rewrite man, I guess it is, with the paper. I don't really know.

Q. Do you know whether or not any employees of the "Enquirer" were paid to have their names appear as the writer of the article in the paper, in the publication, when they, in fact, did not write the article?

A. That question is very muddled. Clarify it.

MR. MASTERSON: I am going to object. I will object to the question on the grounds of lack of relevancy. It is now, you know, at least two hours and 10 minutes that we have been sitting here. If you want to ask a question about the article in issue, I really wish you'd do so.

MR. ABLON: I will get to that, but I think that the operations and procedures used by the "Enquirer" are very germane to this lawsuit.

THE WITNESS: Don't you think coming from an actual employee who has spent time there would be more germane than asking me?

MR. MASTERSON: You took the words right out of my mouth, Mrs. Chesis.

MR. ABLON: Coming from anyone who has any information is equally as germane, and that's what we're here to find out.

THE WITNESS: Get on.

MR. MASTERSON: I think this is a terrible waste of everyone's time.

MR. ABLON: I apologize for taking up your time.

EXHIBIT B

[DEPOSITION OF DAYZHUN JANE CHESIS]

A. Thom Keith.

MR. SELVIN: I'm sorry. I didn't get the name.

THE WITNESS: Thom Keith, T-h-o-m K-e-i-t-h.

Q. BY MR. ABLON: Do you have any information as to anyone else who may have provided any information to the "National Enquirer" with regard to that paragraph that I just read?

A. I don't think so.

Q. How did you learn that Thom Keith provided information with regard to that particular paragraph? Where does your information come from?

A. I heard it someplace, but where, I don't remember.

Q. Do you have any suspicions as to who else may have been responsible for providing any information to the "National Enquirer" with regard to that paragraph I just read?

A. No.

Q. Do you have any information or suspicion with regard to anyone who may have provided the "National Enquirer" with information that was contrary to the paragraph which I just read?

A. No.

Q. The third paragraph states: "Sadly, they charge that it's gotten so bad that Shirley is barely able to make it through the day. And millions of fans of her new TV show, 'Shirley,' don't realize that the seemingly bubbly star is really crying on the inside."

With regard to this third paragraph, do you have any information, hearsay or otherwise, as to who provided any information to the "National Enquirer" with regard to the content of that paragraph?

A. Yes.

Q. Can you tell me who that might be?

A. Bobby Lucas.

Q. Is that the gentleman you referred to in your last deposition as living in the same apartment building that you reside in?

A. He used to.

Q. Does he no longer live in that building?

A. That's right.

Q. Do you know where Mr. Lucas now resides?

A. I have no idea.

Q. Do you have a phone number where Mr. Lucas can now be reached?

A. No.

Q. Can you tell me approximately, to the best of your knowledge, when Mr. Lucas changed his residence?

A. No, not really.

Q. Do you have a rough approximation?

A. In the past month or so.

(Whereupon, the witness and Mr. Wilson conferred.)

MR. WILSON: Excuse me. My client tells me that all these questions, these same questions, have been gone over at the prior deposition. Is that true?

MR. ABLON: Some of the questions have. I did not go through the article on a paragraph-by-paragraph basis, although she did at that time give some general information as to the * * *

* * * *

Q. Do you have any information as to whether or not Mr. Parmiter was the editor involved in the Shirley Jones-Marty Ingels article?

A. Yes.

Q. Was Mr. Parmiter involved in that article?

A. Yes.

Q. To your knowledge, was he the exclusive editor of that article?

A. I don't know that.

Q. Was he an editor of that article?

A. Yes.

Q. Where did you come by this information?

A. He's John South's editor.

Q. How does that help us with regard to your information?

A. Well, when I worked for them and I worked with John South, it would always be for Mr. Parmiter.

Q. You are personal friends with Mr. South; is that correct?

A. I am.

Q. So you have had conversations with Mr. South on one subject or another since the publication of the article we are talking about?

A. I have.

Q. Has Mr. South ever indicated to you expressly that Mr. Parmiter was the editor or an editor involved in this particular article?

A. No.

• • • •

Q. What was the nature of your subsequent discussions with Mr. South concerning this article?

A. It was—it was after I had left the "Enquirer" and after the suit had been filed and just after suit had been filed, I assume.

Q. Had you discussed the subject of this article with Mr. South at any time after you gave him these five telephone numbers prior to the initiation of this lawsuit?

A. Are you referring to—I want clarification on this. Are you referring to the five numbers I gave him.

Q. Yes.

A. No.

Q. So there were no subsequent conversations between those five numbers, the time of your giving those five numbers to him, and the filing of this lawsuit between yourself and Mr. South relative to this article?

A. No.

Q. By the way, by "no," you mean "yes"? I framed my question in such a way that——

A. He and I did not discuss the phone numbers at a later date. I merely gave him the numbers and forget about them.

Q. Did you discuss anything other than those numbers after giving those numbers to Mr. South and prior to the initiation of this lawsuit that relates to this article?

A. Yes.

Q. Do you recall approximately when you had these discussions with Mr. South?

A. September of '79.

Q. First of all, where were you when you had the conversation?

A. I was at home.

Q. Was it a telephone conversation?

A. Yes, it was.

Q. Mr. South was in Florida at the time?

A. I don't know.

Q. He called you?

A. Yes.

Q. What was the substance of this conversation with Mr. South in September of '79?

A. He had spoken with Betty Hager, and she had referred him to me.

Q. I believe you testified as to this conversation at your last seating of the deposition.

A. I did.

Q. Do you recall anything else apart from this reference to Miss Hager that was the subject of that conversation with Mr. South?

A. No.

Q. Any other conversations after you had given Mr. South the five telephone numbers and prior to the initiation of this lawsuit after the September of '79 conversation in which you discussed Betty Hager?

A. You mean pertinent to the article?

Q. Pertinent to the article.

A. No.

Q. By the way, you are personal friends with Mr. South, you have testified.

A. I am.

Q. Do you get to see Mr. South on a regular basis?

A. Unfortunately, no.

Q. How frequently would you say you get to physically visit with Mr. South? That's a very poorly worded question.

A. Whenever he's in town, we try.

Q. Does Mr. South come to town frequently?

A. It depends.

Q. Would you say he's here six times a year?

A. Yes.

Q. Would you say he's here a dozen times a year?

A. No.

Q. Somewhere around six to a dozen, then?

A. Yes.

Q. Do you have any information as to why Mr. South, when he is in town, why he's in town?

A. No.

Q. Any suspicion, or does he indicate to you whether it's on business or for pleasure?

A. No.

Q. Which is it usually, to your knowledge?

A. Business.

Q. When you say "business," is it business of the "National Enquirer" that he's usually here for?

A. Yes.

Q. To your knowledge, within the last year, has Mr. South been in California, in the Los Angeles area, for any personal business reasons?

A. No.

Q. Has Mr. South ever come to California to look for a job?

A. No.

Q. Do you recall having a meeting with Mr. South on January 9, 1980?

A. Not a meeting.

Q. If it wasn't a meeting, what was it?

A. A luncheon.

Q. At that time, did you have any knowledge as to why Mr. South was in town?

A. Yes.

Q. Why was he in town?

A. Business.

Q. Do you have any information as to what that business was?

A. A story.

Q. Did Mr. Smith have any motivation or specific reason to meet with you at that time, to the best of your knowledge?

MR. MASTERSON: You mean did he say that to her?

Q. By MR. ABLON: Did he say that or otherwise indicate to you that there was some particular specific reason why he wanted to speak with you on that day?

A. Not specific, no.

Q. Do you recall in our meeting in this office on January 9th earlier that same day indicating that Mr. South and you were getting together for lunch for the purpose of discussing his trying to find other employment—

A. Yes.

Q. —other than with the "National Enquirer"?

A. Yes.

Q. Do you recall indicating in that conversation that, in fact, Mr. South was in California for the purpose, or at least as one of the purposes, of trying to find other employment?

A. He was entering—yes.

Q. Was that a true statement when you made it?

A. Yes.

Q. So, then, in fact, Mr. South was in California on January 9th for the purpose, to your knowledge, of procuring employment other than with the "National Enquirer"?

A. No.

Q. Explain why not.

A. He was here for work. While here, he was going to investigate the possibilities of other employment.

Q. Do you have any information as to whether or not Mr. South, in fact, so investigated the possibilities of other employment?

A. He spoke with some people, but I don't know who.

Q. To your knowledge, is Mr. South still employed by the "National Enquirer"?

A. Yes.

Q. Do you have any information at all, to the best of you recollection, as to who those people he spoke with may have been?

A. No.

Q. Did he discuss the subject of procuring other employment at this luncheon?

A. Yes.

Q. What did he say specifically as to that effort on his part?

A. That since he had to travel so much out here it would give him more time with his children if he obtained employment here.

Q. Where do Mr. South's children reside?

A. In Florida.

Q. With regard to paragraph 8 of the article, it states: "Every day Ingels calls her on the set and they have screaming fights over the phone. The other day she was shouting, 'Leave Patrick alone. I want him to go to school and make something of himself—I don't want him to be a teenage idol!' "

Do you have any information as to who provided the "National Enquirer" with any information relevant to that particular paragraph?

A. No.

Q. Any suspicions as to who may have provided any information as to that paragraph?

A. Ruth Aarons—Abrams, whatever.

Q. Upon what are your suspicions based?

Q. Do you recall who at the cocktail party mentioned • • •

• • • •

EXHIBIT C

[DEPOSITION OF DAYZHUN JANE CHESIS]

* * * *

* * * Body Shop. I mean, would you know her by sight, as opposed to by name?

A. Not to my knowledge.

Q. Do you have any information as to whether she still works at the Body Shop?

A. No, I don't.

Q. Do you have any information as to anyone else who may have provided the "Enquirer" with information which was the basis of that paragraph?

A. Yes.

Q. Who else might that be?

A. Me.

Q. Do you recall approximately the time when you provided them with this information?

A. September of '79.

Q. Any recollection as to whether it was the beginning of the month, the middle of the month, the end of the month?

A. No, just the month of September.

Q. Did you speak with anyone at the "National Enquirer" to provide them with this information?

A. Yes.

Q. Was it by a telephone conversation?

A. Yes.

Q. Did you make the telephone call, or did the person with whom you spoke make the call?

A. The person with whom I spoke made the call.

Q. Who was that person?

A. John South.

Q. Could you tell me the substance of your conversation with Mr. South at that time?

A. Yes. He called and said he had spoken with Betty Hager and she had told him that I knew the entire story, to call me.

Q. What entire story?

A. Concerning her episode with Marty Ingels and his casting couch.

Q. I believe or at least it's my recollection that you did testify to the substance of that conversation at a previous seating of your deposition. Is that correct?

A. I did.

Q. Was there anything else discussed with Mr. South in that conversation concerning the article? Did you provide him with any other information?

A. No.

Q. Do you have any other information as to who else may have provided information or facts to the "Enquirer" which were the basis of this paragraph of the article?

A. No.

Q. Do you have any information of anyone having provided facts or information to the "National Enquirer" which were contradictory to the statement in the article?

A. No.

Q. Paragraph 13 of the article states: " 'I was furious to find that I was the victim of a classic casting couch routine,' complained one young would-be actress."

• • • •

A. No.

Q. Any information with regard to the truth or falsity of that statement?

A. No.

Q. Have you ever had any personal contact either in person or orally with Mr. Lloyd Kolmer?

A. Don't even know him. Who is he?

Q. I'll read you the article and tell you. Paragraph 18 states: "People who have worked closely with Ingels are throwing up their hands in despair."

Again, this is a separate paragraph, but conceptually I think it is related, so I will include it at this point.

" 'The man is sick and he's hurting my industry,' fumed Lloyd Kolmer. 'I try to reason with him but he rants and raves and then sends me threats. The man is a maniac!' "

Do you have any information with regard to whether

or not Mr. Kolmer contacted the "Enquirer" and gave them the quote that I have just read?

A. No.

Q. Do you have any suspicion as to whether, in fact, Mr. Kolmer had that contact with the "National Enquirer"?

A. If they printed it, he called them.

Q. Do you have any information with regard to whether or not Mr. Ingels was contacted prior to the publication of this article and told either the substance of it or otherwise read the article?

A. Yes.

Q. How did you come by this information?

A. From Mr. John South.

Q. Did you have a discussion with Mr. South at which this previous telephone call to Mr. Ingels came up?

A. Yes.

Q. Do you recall approximately when that conversation was?

A. Prior to publication.

Q. Do you have any information or recollection as to how close or proximate your conversation with Mr. South was to the time he actually spoke with Mr. Ingels?

A. No.

Q. Can you please relate to us what the substance of that conversation was?

A. Yes. John thought it was quite funny. He had called Marty and read him the article, and Marty had said, "I'm flattered, even though there's no truth in it." He said, "Print it."

Q. When you said he said "Print it," are you saying that Mr. Ingels—

A. Mr. Ingels.

Q. —had told Mr. South to print it?

A. Yes. I believe so.

Q. This is your recollection of what Mr. South told you with regard to Mr. Ingels' conversation with him?

A. Yes. He said Marty was quite flattered and very witty and amused on the phone.

EXHIBIT D

[DEPOSITION OF DAYZHUN JANE CHESIS]

* * * *

Q. Does this quotation suggest, Mrs. Chesis, that, or at least were you trying to suggest by this quotation that the "Enquirer" would go to someone at the City Slicker and, in effect, put words in their mouth and then offer to pay them for saying those words?

A. No. No way.

Q. On page 9 of the transcript, Mrs. Chesis, approximately two-thirds of the way down a statement is attributed to you as follows: "And I know two hours later I got a call from the Enquirer. 'What are you going to do at the offices of Hayes & Hume?' "

Is that an accurate transcription of what you said to Mr. Ingels in the course of your conversation with him?

A. I think whoever typed this transcript must have missed something I said before that.

Q. I'm asking you right now whether or not the portion that I just read to you is an accurate transcription of what you said to Mr. Ingels?

A. That's a portion of what I said to him.

Q. The portion that I have just read to you, is it an accurate portion?

A. Yes.

Q. Is it, in fact, an accurate statement? Is it true?

A. Yes.

Q. Can you tell me who you got a call from at the "National Enquirer"?

A. I had called and left word for John South that I had received a subpoena, and I gave Nancy Bryson the case number and everything that was off of it. They called back and wanted to know what I was going to do and when.

Q. When you say "they called back," who specifically?

A. John. I think I told him his guess was as good as mine but that it was on January 9th.

Q. When you say "it was on January 9th," that was the day on which you were speaking with Mr. South?

A. No, no. That's the date on the subpoena. This would be—I'd say this would be either the last week of November or the first week of December that I received it. I don't remember.

Q. Starting on the bottom of page 12 of the transcript, you recount—at least if this is an accurate transcription—you recount a story concerning an episode regarding Marty Ingels.

A. Which I think is a very funny story, and it was told in humor.

Q. Is this an accurate version of what transpired?

A. Yes, it is.

MR. MASTERSON: What is? Just so I can orient myself, where exactly are you?

MR. ABLON. I'm referring now to the statement on the bottom of page 12, which starts out: "All right. They did a story on Marty about two years ago. Tony Brenner did it. Tony even wanted to speak to you and Laveta said that you were very busy. And he said ask him if he'd rather I print the story about how he married a wealthy woman cause he was • • •

• • • •

• • • don't know that much about it.

Q. Were there any personalities or celebrities that you had heard anyone say or suggest that the "National Enquirer" was out to get for any reason?

A. Not the way you're saying it, no.

Q. In what way?

A. That they would love to get a story on, but not detrimental.

Q. Have you had any contact with anyone at the "National Enquirer" since the last date of your deposition on May 22nd?

A. I have.

Q. With whom have you spoken?

A. John South.

Q. Is John South the only person who is employed by or involved with the "National Enquirer" that you have spoken to?

A. He is.

Q. Have you spoken to him only once?

A. Only once.

Q. When was that, approximately?

A. Just a minute, and I will tell you exactly. Oh, no, it was before. I'm sorry. It was May the 18th.

Q. Do you recall the nature of that conversation?

A. Yes. "Bring your children the next time you come out here."

Q. Anything else? Did you discuss at all this—

A. We do not discuss this. We made it a point never to mention Marty Ingels or Shirley Jones or any of the other cases pending.

MR. ABLON: Could we take a five-minute break?

MR. MASTERSON: Sure.

(A brief recess was taken.)

Q. BY MR. ABLON: In connection with the Jones and Ingels article, did Mr. South confer with you at all for background for that particular article?

A. Only as I stated previously, the Betty Hager.

Q. You also, I believe, indicated that you did provide him with some phone numbers.

A. I did.

Q. Other than those two instances, was there any other collaboration or discussion between yourself and Mr. South with regard to this article?

A. No.

Q. Did you in any other fashion provide him with any assistance with regard to this article?

A. No.

Q. Let me ask you something else: Mr. South testifies at his deposition—and I will read just a portion of it from page 143, lines 10 through 15: "There were other examples of where I could not speak personally to people who were supplying information on this story because they were afraid to speak to the 'National Enquirer' direct because of an express fear of Mr. Ingels, and, thus, they would speak only to a source that they knew extremely well and trusted implicitly."

EXHIBIT E

[TESTIMONY OF IAIN CALDER]

DIRECT EXAMINATION

BY MR. BRONSON:

Q. Mr. Calder, where do you live?

A. I live in Florida, in Del Rey Beach.

Q. By whom are you employed?

A. The National Enquirer.

Q. In what capacity?

A. I'm editor and president of the National Enquirer.

Q. And how long have you been editor and president?

A. Well, I was made editor before I was made president, so I've held both functions for about four years now.

Q. That would take us back to 1976?

A. I was certainly editor in 1976.

Q. Okay.

A. I may have been president late '76.

Q. And the publisher and owner we've been told in the testimony is Mr. Generoso Pope, Jr.

A. That is correct.

Q. And are you the No. 2 man, so to speak, to the owner and publisher, Mr. Pope?

A. Yes, that's correct.

Q. And has that been the case for the past four years or so?

A. Yes, it has.

Q. Now, we are here on Monday, and maybe we can go over the people that we have heard so far in the testimony, and correct me if I'm wrong.

What I've tried to do here on this—

• • • •

Q. BY MR. BRONSON: Mr. Calder, I understand that you treat retractions in the gossip column differently than you do with respect to other articles?

A. I'm not sure—As far as what is concerned—

Q. As far as using a headline such as "Correction" is concerned.

A. Well, we have never used a correction on a gossip column headline in a retraction, as far as I can remember.

Q. And you have used a headline in a retraction before, have you not ?

A. In a story?

Q. Yes, sir.

A. Yes.

Q. You have used a headline, and it says, 'Correction"?

A. I don't emember the exact word.

Q. But you have used a headline on a retraction in an article?

MR. MASTERSON: Your Honor, I object. This is now irrelevant. We are on articles, not items.

THE COURT: No, I don't think it it. I think it is perfectly proper for him to pursue this. Overruled.

THE WITNESS: I don't remember the exact words.

Q. BY MR. BRONSON: Well, who is responsible for doing these kind of things at your place the last four years?

A. Who is responsible for deciding if a correction is going out? Is that what you are asking me?

Q. Yes. And how it's done.

A. It's mine.

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Attorneys for Plaintiffs

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C 305009

SHIRLEY JONES and MARTY INGELS,
Plaintiffs,

vs.

NATIONAL ENQUIRER, INC., *et al.*,
Defendants.

[Filed May 28, 1981]

DECLARATION OF MARTY INGELS IN SUPPORT OF OPPOSITION TO MOTION TO QUASH SERVICE OF SUMMONS ON JOHN SOUTH AND IAIN CALDER

Date: June 2, 1981
Time: 9.00 a.m.
Dept. 80

DECLARATION OF MARTY INGELS

I, MARTY INGELS, declare as follows:

1. Since approximately 1977, I have at all times resided with my wife, Shirley Jones, at my current resi-

dence in Beverly Hills, California. I resided in California for several years before that.

2. Approximately 2 to 3 weeks prior to the publication of the article which is the subject of my lawsuit, I received a telephone call, at my Beverly Hills residence, from Mr. John South, under whose by-line the article appeared, who stated that he would like to read to me a story that the National Enquirer intended to publish. My recollection is that the story which he read to me was virtually identical to, if not identical to, the article that was ultimately published and which is the subject of this lawsuit.

3. After reading the entire story to me, word for word, Mr. South asked me words to the effect of "How do you feel about that? Do you have anything to say?"

4. As a result of the reading of this article on the phone, I became physically ill and upset, evidencing a severe physiological reaction to this unjustified article. I put Mr. South on hold, and vomited and became quite ill.

5. I came back to the phone, and indicated to Mr. South that he could not possibly be printing that article, that it was all untrue, and that he could not possibly have spoken to anyone of any credibility in obtaining his facts for the story. I never said to him that they should print this pack of lies.

If called upon to testify, I can competently testify to the facts stated herein. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 26th day of May, 1981, at Beverly Hills, California.

/s/ Marty Ingels
MARTY INGELS

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
DEPT. 80

DATE: June 2, 1981

HONORABLE Eli Chernow, JUDGE

Linda Markmiller, DEPUTY CLERK

C 305009

SHIRLEY JONES, *et al.*	Counsel for Plaintiff Paul Ablon
vs.	
NATIONAL ENQUIRER, INC., *et al.*	Counsel for Defendant Rogers & Wells for defendants, John South and Iain Calder by: John Karaczinski

NATURE OF PROCEEDINGS

Motion of defendants, John South and Iain Calder, to quash service of summons and complaint	Continued for additional papers from both sides due by July 15, 1981, responses due by July 29, 1981.

Continued to 8-5-81 in Dept. 80 at 9:00 a.m.

On court's own motion

Notice Waived

MINUTES ENTERED June 2, 1981

COUNTY CLERK

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Specially for Defendants
South and Calder

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C305009

SHIRLEY JONES, *et al.*,
Plaintiffs,

v.

NATIONAL ENQUIRER, INC., *et al.*,
Defendants.

[Filed Jul 15, 1981]

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO QUASH SERVICE ON JOHN SOUTH AND IAIN CALDER

Date: August 5, 1981
Time: 9:00 a.m.
Dept: 80

• • • •

C. *Special Considerations.*

The cases also make clear that "the 'minimum contacts' test of *International Shoe* is not susceptible of mechanical application." *Kulko* v. *Superior Court*, *supra*, 436 U.S. at 92. In determining whether assertion of extraterritorial jurisdiction is proper courts will look to the consequences of its assertion on other constitutionally protected policies.

1. *Individuals.*

International Shoe was in part an attempt by the U.S. Supreme Court to come to grips with the reality of large interstate corporations doing interstate business. Most of the cases in which extraterritorial jurisdiction has been upheld involve such entities. In most the question has been, in Judge Learned Hand's words in a case that paved the way for *International Shoe*, "what dealings make it just to subject *a foreign corporation* to local suit." *Hutchinson* v. *Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (2d Cir. 1930) (emphasis supplied).

The situation of an individual is different, however, and it is two individuals who are targeted here. Whatever level of contacts due process may tolerate as sufficient when jurisdiction is sought over a foreign corporation (compare *International Shoe*, *supra*, with *World-Wide Volkswagen*, *supra*), even closer care is appropriate when as here constitutional protection is asserted by foreign individuals.[4]

Courts have noted that jurisdiction over foreign individuals may be impermissible in situations where for corporations it might be tolerated. *See, e.g., Kipperman* v. *McCone*, 422 F. Supp. 860, 875 (N.D. Cal. 1976); *Marra* v. *Shea*, 321 F. Supp. 1140 (N.D. Cal. 1971). A

[4] Thus, for example, a standard casebook on civil procedure divides its chapter on "Jurisdiction 'of the Person'" into "Section 1. Natural Persons"and "Section 2. Corporations." R. Field & B. Kaplan, *Civil Procedure* 625, 650 (temp. 2d ed. 1968).

natural person has certain reasonable expectations as to where he may be summoned to defend himself that a corporation does not. An individual is likely to suffer personal inconvenience that in the corporate context does not exist.

Jurisdiction of a corporation does not carry with it jurisdiction over the corporation's employees. Here the corporation, which is the real target of the plaintiffs' claim, has not challenged this Court's jurisdiction. Nothing in the complaint or in plaintiffs' opposition discloses any substantial reason why these two Florida employees were sued at all, other than perhaps for harassment. This suit can proceed very well without their being dragged across the country to be parties.

2. *First Amendment.*

Editor Calder and reporter South are sought for suit in connection with publishing activities. Calling them to answer in California unavoidably affects and dampens the exercise of First Amendment rights by them and other journalists. The cases make clear that that effect cannot be ignored in weighing the propriety of jurisdiction—whether considered as a First Amendment matter alone,[5] or as a First Amendment aspect prominent among the policy considerations mandated by *International Shoe*.

There is nothing unusual in looking even to non-constitutional policy considerations to bar extraterritorial jurisdiction. In *Kulko* v. *Superior Court*, *supra*, for example, the Supreme Court recently noted that one reason it would be inappropriate to allow jurisdiction based on a child's intermittent visits to a local parent was that to do so "would discourage parents from en-

[5] "[T]he First Amendment could be regarded as giving *forum non conveniens* special dimensions and constitutional stature in actions for defamation against publishers and broadcasters." *Buckley* v. *New York Post Corp.*, 373 F.2d 175, 183-84 (2d Cir. 1967) (Friendly, J.).

tering into reasonable visitation agreements," 436 U.S. at 93; likewise, to make jurisdiction depend on whether visits were resisted or not "would impose an unreasonable burden on family relations," *id.* at 98. The same attention to policy is visible in decisions like *Davis* v. *Farmers Co-operative Equity Co.*, 262 U.S. 312 (1923), in which Mr. Justice Brandeis for the Court held, relying on the Commerce Clause, that the burden on interstate commerce would be too great if interstate railroads were subjected to suit in states where they merely solicited business.

Not surprisingly, many cases have used similar reasoning to hold that the constitutional weight of the First Amendment can bar extraterritorial jurisdiction over interstate publishing companies—not even, as here, their individual employees. Special considerations are recognized when the attempt is made to haul before a distant forum a newspaper or its employees. The First Amendment, the Supreme Court has often stated, is concerned with preventing judicial proceedings which threaten a "chilling effect" on the exercise of First Amendment freedoms. *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965). Courts have recognized that the First Amendment could be drained of meaning if publishers were required to defend libel suits in every forum where copies of their newspapers were circulated. *Cf. Washington Post Co.* v. *Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967) (summary procedures essential to assure "freedom from the harassment of lawsuits").

This has been emphasized in a series of cases in the U.S. Court of Appeals for the Fifth Circuit, the leading one of which is *New York Times Co.* v. *Connor*, 365 F.2d 567 (5th Cir. 1966). There the court held that newspaper circulation plus solicitation of advertising plus alleged libel in a state still did not suffice for extraterritorial jurisdiction. The Court held that "First Amendment considerations surrounding the law of libel require

a greater showing of contact to satisfy the due process clause then is necessary in asserting jurisdiction over other types of tortious activity. This is not a new proposition." 365 F.2d at 572. Earlier the same court had referred to "the inherent danger or threat to the free exercise of the right of freedom of the press if jurisdiction in every state can be inferred from minimal contacts." *Walker* v. *Savell*, 335 F.2d 536, 544 (5th Cir. 1964).

Subsequent Fifth Circuit cases pointed out that although weighty, First Amendment considerations are not an absolute bar. But the great significance of the constitutional guarantee in determining the issue of extraterritorial jurisdiction was emphasized in that court's most recent pronouncement on the subject:

> "[W]e have woven, in regard to entities clothed with First Amendment protections, a tighter due process net around state power than is true with regard to other entities.
>
> • • • •
>
> When a court attempts to assess whether jurisdiction over a defendant is reasonable, First Amendment considerations are a significant factor to be weighed." *Edwards* v. *Associated Press*, 512 F.2d 258, 266 (5th Cir. 1975).

These considerations have been approved in decisions of other jurisdictions. *See, e.g., Margoles* v. *Johns*, 333 F. Supp. 942 (D.D.C. 1971), *aff'd*, 483 F.2d 1212 (1973); *Gonzales* v. *Atlanta Constitution*, No. 78 C 2969 (N.D. Ill. Jan. 10, 1979) (copy attached). As Judge Medina commented in *Buckley v. New York Post Corp.*, 373 F.2d 175, 184 (2d Cir. 1967), "I am not shocked to see the principles embedded in the First Amendment applied to the expanding subject of jurisdiction over the person." (Concurring opinion.)[6]

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[6] We recognize that one opinion from the Court of Appeals of another district—although it *rejected* a plaintiff's attempt to serve a publisher in another state—contained a dictum it that did not

Indeed, the Comment of the Judicial Council to the California long-arm statute, Code of Civil Procedure § 410.10, expressly recognizes that what is reasonable so far as the assertion of jurisdiction is concerned may be more limited in a defamation case precisely because of the First Amendment values jeopardized in such an action.[7]

The potential chilling effect on individual reporters and editors of exercising jurisdiction based only on an "effect" in the forum caused by a news story is, if anything, even greater. A reporter will certainly be chilled in exercising his right to free expression if a libel plaintiff in any state can subject the reporter or editor to that state's judicial power simply by filing a complaint and mailing a letter. Such a result would increase the "risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

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consider the First Amendment to have a special role in determining the propriety of asserting extraterritorial jurisdiction. *Sipple* v. *Des Moines Register and Tribune Co.*, 82 Cal. App. 3d 143, 147 Cal. Rptr. 59 (1978). The dictum of that First District opinion, however, is against the weight of authority. Nor can it be assumed to reflect the law in the state of California, particularly after the United States Supreme Court's decision in *Kulko* v. *Superior Court, supra*, reminded of the constitutional limitations on the California long-arm statute and the need to look to broader policies in applying it.

[7] The Comment of the Judicial Council, at 474 provides:

> "Some actions, such as defamation, affect interests of a defendant that are protected by the First Amendment of the United States Constitution. For a state to have judicial jurisdiction over such actions, it may be that the defendant must have a closer relationship to the state, or have caused effects of a more substantial nature in the state, than would otherwise be required."

See also *Restatement (Second) Conflicts of Laws* § 37 (1971) (caveat, comment d); J. Weinstein, *Trends in Civil Practice*, 62 Colum. L. Rev. 1431, 1436 (1962).

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Attorneys for Plaintiffs

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C 305009

SHIRLEY JONES and MARTY INGELS,
Plaintiffs,

vs.

NATIONAL ENQUIRER, INC., ETC., *et al.*,
Defendants.

[Filed Jul. 31, 1981]

FURTHER DECLARATION OF PAUL S. ABLON IN SUPPORT OF OPPOSITION TO DEFENDANTS JOHN SOUTH AND IAIN CALDER'S MOTION TO QUASH SERVICE OF PROCESS

Date: August 5, 1981
Time: 9.00 a.m.
Dept: 80

DECLARATION OF PAUL S. ABLON

I, PAUL S. ABLON, declare as follows:

1. I am an attorney duly licensed to practice before all courts of the State of California, and am an associ-

ate of the law firm of Hayes & Hume, attorneys for the plaintiffs in the above subject action. I have reviewed the files in this matter in preparation of this declaration.

2. Request is hereby made that this court take judicial notice, pursuant to Evidence Code, § 452, that defendant South has filed an affidavit in the matter of *Marianna Liu and Kwot Kit Faan vs. National Enquirer, Inc., et al.*, Superior Court of the State of California, County of Los Angeles, No. C 172266, in support of motion for summary judgment, heard on April 28, 1978, at 9:00 a.m. in Dept. 83, and that defendant South has also filed an affidavit on or about May 13, 1980, in this lawsuit in support of defendants' opposition to motion to compel disclosure of confidential news sources. This court should also take judicial notice that the declaration filed in this matter by John South in connection with the motion to compel was notarized and signed in the state of Nevada.

3. The previous affidavit of John South filed in this matter, in connection with the motion to compel production of documents, related to the objections by the National Enquirer to such production based upon a claim of an alleged newsman's source privilege. Thus, Mr. South's declaration in opposition to that motion was of personal benefit to him. As a newsman, he, along with the publication, could claim the benefit of such a newsman's privilege, if any existed. In fact, at his deposition, such a privilege was asserted on his behalf.

4. The fact that Mr. South's affidavit in opposition to motion to compel production of documents stated that it was not intended to make a general appearance is of no legal effect. The law is clear that the nature of the acts, not the intention of the defendant, determines whether or not a general or special appearance has been made. *Pease vs. San Diego*, 93 Cal.App.2d 746 (1949); *Slaybaugh vs. Superior Court*, 70 Cal.App.3d 216, 221 (1977).

5. In the case of *Wilson vs. Barry*, 102 Cal.App.2d 778 (1951), it was concluded that "likewise the filing of an affidavit other than for the purpose of presenting matters bearing on the court's jurisdiction, constitutes a general appearance". This opinion is buttressed by *Chitwood vs. County of Los Angeles*, 14 Cal.App.3d 522 (1971), which indicated that:

> "While § 1014 of the Code of Civil Procedure lists acts which amount to a general appearance, that list is not necessarily exhaustive. [citation omitted]. The underlying theory of a general appearance is that it is effected when a defendant *takes any part in the action or proceedings*, e.g., by pleading or by participating in the trial, other than to specifically contest the court's jurisdiction over his person." (At p. 526.) (Emphasis added.)

Further, the California Supreme Court has cited *Wilson vs. Barry, supra*, with approval in the case of *Greene vs. Committee of Bar Examiners*, 4 Cal.3d 189, 200 (1971). (Copy of *Wilson* is attached hereto as Exhibit A for this court's convenience.)

It is strenuously urged that, pursuant to *Wilson, supra*, Mr. South made what constituted a general appearance by filing his affidavit in opposition to plaintiffs' motion to compel production of documents. Even if the poorly reasoned distinction of *Wilson* contained in *Slaybaugh vs. Superior Court, supra*, (that only affidavits requesting relief by a party himself constitutes a general appearance) is accepted, here South himself stood to benefit by any decision of the court finding a newsman's privilege. It would sustain a newsman's privilege objection made on his behalf at his deposition.

6. However, even if this court were to conclude under the authorities stated that Mr. South did not make a general appearance by filing the aforesaid affidavit, again, this court must consider this fact as one yet addi-

tional fact in assessing the reasonableness and fairness of subjecting Mr. South to jurisdiction in California. It hardly seems fair that Mr. South would be permitted to evade California jurisdiction while at the same time sending into this state, in connection with various motions, affidavits to support the National Enquirer's position. For, if Mr. South can so conveniently participate and assist the National Enquirer in its defense in this matter, it is not apparent why he cannot do so for himself.

I declare under penalty of perjury that the foregoing is true and correct, and if called upon to testify, I could competently testify thereto.

Executed this 31st day of July, 1981, at Beverly Hills, California.

/s/ Paul S. Ablon
PAUL S. ABLON

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 80 HON. ELI CHERNOW, JUDGE

No. C 305009

SHIRLEY JONES, *et al.*,
Plaintiffs,

vs.

NATIONAL ENQUIRER, INC., *et al.*,
Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

• • • •

[1] LOS ANGELES, CALIFORNIA,
WEDNESDAY, AUGUST 5, 1981
9:30 A.M.

THE COURT: No. 6, Jones versus the National Enquirer.

MR. KESTER: Good morning, Your Honor. I am John Kester, representing the moving party in this case, Iain Calder and John South. We are appearing especially [*sic*] on their behalf.

MR. SELVIN: I am Paul Selvin, local counsel for the moving party.

MR. ABLON: Good morning, Your Honor. I am Paul Ablon, A-b-l-o-n, from the law firm of Hayes and Hume, representing plaintiffs, Marty Ingels and Shirley Jones.

• • • •

[24] The COURT: What about the privilege subject? Surely the court should draw the reasonable inference that Mr. South did some kind of investigation in California by telephone or in person before he wrote the article.

MR. KESTER: I think the court might draw that inference that he had made phone calls, but I don't think Your Honor can draw the inference that he was traveling in California. There is nothing in the record that would

support that inference. And the burden, Your Honor, is on the plaintiffs to establish the jurisdictional facts.

What I am saying is that they have not done so in this case. Now, there's one thing since Mr. Ablon mentioned it, I received on my desk Monday morning a declaration of Mr. Ablon that apparently was filed last Friday afternoon in which the plaintiffs totally shifted their ground and came up with a new argument for jurisdiction in this case. They are saying that they can have jurisdiction on Mr. South because he filed an affidavit.

THE COURT: Oh, that's nonsense.

MR. KESTER: Okay. I will pass that.

• • • •

[27] MR. KESTER: I have not had an opportunity to respond to Mr. Ablon's declaration or affidavit filed Friday. I don't intend to unless Your Honor—

THE COURT: I agree.

MR. KESTER: —would like.

THE COURT: That's fine.

• • • •

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
DEPT. 80

DATE Aug. 5, 1981

HONORABLE Eli Chernow, JUDGE

Linda Markmiller, DEPUTY CLERK

/s/ Lawanda Johnson
Reporter

(Parties and counsel checked if present)

C 305009

SHIRLEY JONES, *et al.* Counsel for Plaintiff

vs. Paul Ablon ✓

NATIONAL ENQUIRER, INC., *et al.* Counsel for Defendant
Williams & Connolly
John G. Kester ✓

Selvin & Weiner
Paul P. Selvin ✓

NATURE OF PROCEEDINGS.

Motion of defendants, John South and Iain Calder, to quash service of summons and complaint
(FIRST CONT)

Motion is argued. Ten days leave to lodge with the court supplemental authorities. Matter to stand submitted thereafter without further argument.

MINUTES ENTERED Aug. 5, 1981
COUNTY CLERK

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C 305 009

SHIRLEY JONES and MARTY INGELS,
Plaintiffs,

vs.

NATIONAL ENQUIRER, INC., *et al.*,
Defendants.

MEMORANDUM OF DECISION

This case is based upon an article published in the National Enquirer, which article was allegedly libelous as to plaintiffs Shirley Jones and Marty Ingels. The motion before the Court is to quash service of process on two individual defendants claimed to be legally responsible for the article. One, John South, was the author; the other, Iain Calder, was the editor of the magazine. Both were employees of defendant National Enquirer; both reside in Florida. These individual defendants assert that California courts lack personal jurisdiction over them, relying upon the recent U.S. Supreme Court decisions in *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), and *Kulko v. California*, 436 U.S. 84 (1978). The motion before the Court does not address jurisdiction over the publication and its publisher. There is no contention that National Enquirer may not properly be required to appear in California and defend this action.

In the first analysis, it is necessary to examine the contacts between the individual defendants on the one hand, and the forum state, California, on the other, to

determine whether there is a sufficient nexus for California to assert jurisdiction over these individuals. *International Shoe v. Washington*, 326 U.S. 310 (1945). From the record in this case, it appears that neither South nor Calder maintained any residence or business office within California. Editor Calder did not enter California nor even make telephone calls into the state during his work on the Ingels article. Reporter South made a few telephone calls into California, including one in which he read the substance of the article to plaintiff Ingels shortly before its publication. In addition, it may fairly be inferred from the record before the Court that Reporter South visted California at least once for purposes relating to the article. The totality of such contacts, in this Court's view, are insubstantial.

The most substantial basis for asserting a claim against the individual defendants is that both defendants knew, or certainly should have known, that the article would be published and read in plaintiffs' home community within California, that plaintiffs' personal and business reputations were likely to be substantially damaged by the publication, and that such substantial damage experienced by plaintiffs would occur in their home and business communities within California. Moreover, unlike the case of *World-wide Volkswagen, supra*, the location of the damage to the plaintiffs was not incidental nor remote from the business of defendant. The value of the article to the publishers was precisely that it was a sensational story that would expose unfavorable aspects of well-known people and, thus, would cause embarrassment and damage to the reputations of the plaintiffs. Thus, plaintiffs contend that California's jurisdiction extends sufficiently far to require the individual defendants to appear and answer for the alleged falsity of the article.

Plaintiffs contend that this case is analogous to one in which a defendant ships a dangerous and defective product into the state, which leads to an accident within the

state, causing substantial damage to a California resident. Indeed, if the injury complained of in this case involved a physical injury sustained as a result of a physically defective magazine shipped into California, then the analysis would end at this point and the motion to quash would be denied. *Buckeye Boiler v. Superior Court*, 71 Cal.2d 893 (1969).

The question presented by this case is whether further consideration is required because the case involves First Amendment freedom of expression and because the defendants sought to be brought into this jurisdiction are employees of the publisher. At bottom, the test for the validity of a state's assertion of jurisdiction over a nonresident defendant is not based upon whether the state's geographic boundaries were crossed, nor upon an overly refined analysis of how long a defendant spent on phone calls to California, but rather it is based upon an analysis of the fundamental fairness involved in light of traditional notions of justice. *International Shoe, supra.* The question becomes, then, whether, in assessing the fundamental fairness of the proposed assertion of jurisdiction, the Court should weigh and consider additional factors in cases where freedom of the press is involved. There appears to be some authority to the contrary in California, *Sipple v. Des Moines Register*, 83 Cal.App.3d 143; *McGuire v. Brightman*, 79 Cal.App.3d 776.[1] However, as the U.S. Supreme Court has made abundantly clear in its *World-Wide Volkswagen* and *Kulko* opinions, California may not assert jurisdiction beyond that which

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[1] **(But see Comment of Judicial Council to C.C.P. § 410.10, "Bases of Judicial Jurisdiction Over Individuals," (9):**

> **"Some actions, such as defamation, affect interests of a defendant that are protected by the First Amendment of the United States Constitution. For a state to have judicial jurisdiction over such action, it may be that the defendant must have a closer relationship to the state, or have caused effects of a more substantial nature in the state, than would otherwise be required."**

is permitted under the United States Constitution. The most comprehensive discussions of the effects of the First Amendment, as it relates to the reach of a state's jurisdiction over nonresidents, are found primarily in the decisions of the U.S. Court of Appeals for the 5th Circuit in *New York Times v. Connor*, 365 F.2d 567 (1966); *Walker v. Savell*, 335 F.2d 536 (1964), and *Edwards v. Associated Press*, 512 F.2d 258 (1975), and in *Buckley v. N.Y. Post*, 373 F.2d 175 (2d Cir. 1967). These cases reached varying results as to whether a particular publication could be required to appear and answer particular complaints. However, the cases seem to be in agreement that First Amendment considerations should be weighed in the balance of fundamental fairness in resolving whether a state can compel a nonresident defendant to appear and defend an action. This proposition of federal constitutional law is binding upon this Court.

Applying First Amendment considerations, it appears to this Court that the balance favors the individual defendants. Whether or not the individual defendants South and Calder are required to appear as parties in this case, plaintiffs' rights can be fully satisfied. The publisher, who is the financially responsible party, will remain in the action regardless of the outcome of this motion. Indeed, it has not even been suggested that the National Enquirer itself is beyond California's jurisdiction. There is no reason to believe that plaintiffs' ability to win or collect a judgment would be enhanced if judgment were awarded jointly against the National Enquirer and its two employees, rather than the Enquirer alone. South and Calder may still be required to give testimony under oath at discovery deposition. Other discovery devices are available to bring to light any knowledge or information these individuals have relating to this action.

Indeed, in balancing the interests of all parties to this action, it appears that the principal practical effect of holding the individual defendants as parties to this law-

suit would be to facilitate plaintiffs' claims for punitive damages against the individuals. Such claims are asserted in addition to plaintiffs' claims for such damages against the publisher. Surely the right of a plaintiff to punish a defendant resident of a remote jurisdiction, and to receive damages beyond those necessary to compensate him for his injury should not weigh heavily on the constitutional scale of fundamental fairness. On the other hand, if reporters and editors are required to appear in remote jurisdictions and defend against claims for punitive damages, it is foreseeable that such actions would have a chilling effect on reporters and editors.

It may not be unfair to hold a publisher to account for compensatory and punitive damages in a remote jurisdiction if a sensational story he publishes is false. After all, it is the publisher who balances risk and reward in establishing the character of his publication, and it is the publisher who stands to make substantial profits if he publishes true stores of widespread interest.

It is quite another matter to hold magazine employees to the same accounting. A reporter or editor who suffers an award of punitive damages would not be entitled to reimbursement from his employer, nor to indemnification based on any insurance policy the employee or the employer might have. Thus, punitive damages would come from the employee's own pocket. Few would be willing to risk writing or editing controversial articles for national publications if they could be required personally to appear in remote jurisdictions as individual defendants and possibly suffer judgments for punitive damages, and surely pay unlimited litigation expenses. Thus, prudent reporters and editors would have an incentive to avoid controversial stories vastly disproportional to the rewards they could expect for their diligence and industry in uncovering truthful but controversial stories, especially stories adverse to wealthy or powerful individuals. If such a state of affairs were to come to pass, the informed

public would be the loser. cf. *New York Times v. Connor, supra.*

Finally, quashing service in this case does not necessarily even defeat plaintiffs' right to recover punitive damages from the individual defendants. If their conduct is sufficiently wrongful, punitive damages might well be available if suit is brought in defendants' home jurisdiction, or in some other jurisdiction with which their contacts are more substantial.

For the foregoing reasons, the motions to quash are granted.

DATED: October 2, 1981.

/s/ Eli Chernow
ELI CHERNOW
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
DEPT. 80

Date October 2, 1981

HONORABLE Eli Chernow, JUDGE

S. Percy, DEPUTY CLERK

C 305 009

SHIRLEY JONES, *et al.* — Counsel for Plaintiff
Hayes & Hume
Paul S. Ablon

vs.

NATIONAL ENQUIRER, INC., *et al.* — Counsel for Defendant
Williams & Connolly
John G. Kester
Selvin & Weiner
Paul P. Selvin

NATURE OF PROCEEDINGS

Motion of defendants, John South and Iain Calder, to quash service of summons and complaint

(submitted Aug. 17, 1981)

Motion is granted pursuant to Memorandum of Decision, signed and filed this date.

Counsel are notified by way of this minute order, along with a conformed copy of the Memorandum of Decision, deposited in the U.S. Mail this date.

Law Offices
HAYES & HUME
A Professional Corporation
132 South Rodeo Drive
Beverly Hills, California 90212
Telephone (213) 278-8989

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No. C 305 009

SHIRLEY JONES and MARTY INGELS,
Plaintiffs,

vs.

NATIONAL ENQUIRER, INC., ETC., *et al.*,
Defendants.

[Filed Oct. 28, 1981]

NOTICE OF APPEAL AND APPELLANT'S DESIGNATION OF RECORD FOR APPEAL

NOTICE IS HEREBY GIVEN that plaintiffs, SHIRLEY JONES and MARTY INGELS, appeal, pursuant to California Code of Civil Procedure Section 904.1 (c), to the Court of Appeals of the State of California, Second Appellate District, from that certain Order made and entered by the Court, The Honorable Eli Chernow, in this action on October 2, 1981.

Such Order reads as follows:

> "Motion of defendants, John South and Iain Calder, to quash services of summons and complaint.
>
> (submitted Aug. 17, 1981)
>
> Motion is granted pursuant to Memorandum of Decision, signed and filed this date."

NOTICE IS FURTHER GIVEN that Plaintiffs hereby designate the following papers and records on file or lodged with the Clerk of the above-entitled Court for incorporation in the Record of Appeal, and hereby request the preparation of a Clerk's Transcript, which shall include:

1. Notice of Motion of Defendants, John South and Iain Calder, to quash service of Summons and Complaint, and Points and Authorities, and affidavits in support thereof, served on or about April 30, 1981, and filed with this Court on or about April 30, 1981, scheduling the hearing thereon for May 18, 1981;

2. Notice of Motion of Defendants, John South and Iain Calder, to quash service of Summons and Complaint, and Points and Authorities, and affidavits in support thereof, served on or about May 12, 1981, and filed on or about May 12, 1981, setting the hearing thereon for June 2, 1981;

3. Plaintiffs' opposition to Motion to Quash Service of Summons and Complaint of John South and Iain Calder, dated May 27, 1981, and declarations in support thereof, filed in the Superior Court on May 28, 1981;

4. Declaration of Marty Ingels in Support of Opposition to Motion to Quash Service of Summons on John South and Iain Calder, dated May 26, 1981, and filed on May 29, 1981.

5. Declaration of Stephen S. Monroe in Support of Opposition to Motion to Quash Service of Summons on John South and Iain Calder, dated on or about May 28, 1981, and filed on May 28, 1981.

6. Declaration of Paul S. Ablon in Support of Opposition to Quash Service of Summons on John South and Iain Calder, dated on or about May 21, 1981 and filed on May 28, 1981;

7. Supplemental Memorandum in Support of Motion to Quash Service on John South and Iain Calder, dated July 15, 1981, and filed with this Court approximately July 15, 1981;

8. Supplemental Points and Authorities in Opposition to Motion to Quash Service of Summons on John South and Iain Calder, dated July 15, 1981, filed on or about July 15, 1981;

9. Attachments to Supplemental Points and Authorities in Opposition to Motion to Quash Service of Summons on John South and Iain Calder, filed concurrently with Supplemental Points and Authorities in Opposition to Motion to Quash Service of Summons on John South and Iain Calder, dated July 15, 1981, filed on or about July 15, 1981;

10. Reply of John South and Iain Calder to Plaintiffs' Supplemental Points and Authorities, dated July 28, 1981, and filed on or about July 29, 1981;

11. Plaintiffs' reply to Defendants' Supplemental Memorandum in Support of Motion to Quash Service of Summons on John South and Iain Calder, dated July 29, 1981, and filed on or about July 29, 1981;

12. Further Declaration of Paul S. Ablon in Support of Opposition to the Motion of Defendants, John South and Iain Calder, to Quash Service of process dated July 31, 1981, and filed with this court on or about July 31, 1981;

13. Proofs of Service re Further Declaration of Paul S. Ablon In Support of Opposition To Defendants John South and Iain Calder's Motion to Quash Service of Summons filed on or about August 5, 1981;

14. Minute Order of this Court, The Honorable Eli Chernow, Department 80, dated on or about June 2, 1981, relating to the Motion of the Defendants, John South and

Iain Calder, to Quash Service of Summons and Complaint;

15. Minute Order of this Court, The Honorable Eli Chernow, Department 80, dated on or about August 5, 1981, relating to the Motion of Defendants, John South and Iain Calder, to Quash Service of Summons and Complaint;

16. Minute Order of this Court, The Honorable Eli Chernow, Department 80, entered in the Minutes on October 2, 1981, granting the Motion of Defendants, John South and Iain Calder, to Quash Service of Summons and Complaint;

17. The Memorandum of Decision of The Honorable Eli Chernow, in connection with the Motions of Defendants, John South and Iain Calder, to Quash Service of Summons and Complaint, filed with this Court on October 2, 1981, and dated that same date.

NOTICE IS FURTHER GIVEN that Plaintiffs hereby request that a Reporter's Transcript of the proceedings on August 5, 1981, be prepared for the purpose of accompanying the foregoing as the record on appeal.

Dated: October 26, 1981

HAYES & HUME,
A Professional Corporation

By: /s/ Paul S. Ablon
PAUL S. ABLON, ESQ.
Attorneys for Plaintiffs,
SHIRLEY JONES and
MARTY INGELS

IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

SHIRLEY JONES and MARTY INGELS,
Plaintiffs and Appellants,

v.

IAIN CALDER and JOHN SOUTH,
Defendants and Respondents.

Appeal from
Superior Court for the County of Los Angeles
Honorable Eli Chernow, Judge

BRIEF FOR RESPONDENTS

• • • •

[Pp. 22-23, 28]

. . . Individual employees in another state neither distribute a corporate employer's products nor derive direct profit from the sale of the products. They do not personally avail themselves of the privilege of conducting activities in the forum. *Marra* v. *Shea*, *supra*;[21] *Kipperman* v. *McCone*, 422 F. Supp. 860, 874 (N.D. Cal. 1976). Moreover, the employee, unlike the corporation, cannot structure his conduct to avoid jurisdiction in a

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[21] The court in *Marra* explained:

"Those cases in which this test have been met generally have involved products manufactured for distribution and sale, often on a national basis, and therefore satisfaction of the "purposefully avails itself" test is more readily inferred. *In sum, it would appear that this basis for personal jurisdiction is more applicable to corporate or commercial business defendants than to individual persons.*" 321 F. Supp. at 1146 n.14 (emphasis supplied).

distant forum. Thus, to interpret § 410.10 to hold an employee subject to jurisdiction on the basis of "effects" caused by the corporation, where the employee cannot choose to stop marketing the corporate product in the forum, would deny due process. *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, 444 U.S. at 97; *cf.* Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. COURT REV. 77, 92-96.

When an employee does personally engage in a persistent course of conduct in the forum or personally derives substantial revenue there, personal jurisdiction may possibly be exercised. But without such indicia of "purposeful activity" by the employee in a personal capacity, "problems of constitutional magnitude" arise. *Merkel Associates, Inc.* v. *Bellofram Corp.*, 437 F. Supp. 612, 619 (W.D.N.Y. 1977). The Supreme Court of the United States made this very clear in *Shaffer* v. *Heitner*, *supra*, where it explained:

> "The differences between individuals and corporations may, of course, lead to the conclusion that a given set of circumstances establishes state jurisdiction over one type of defendant but not over the other." 433 U.S. at 204 n.19.

That distinction applies here. While the multistate character of the corporation's enterprise can make it fair to hold the corporation answerable where its products are sold, there is no rationale consistent with fairness or precedent for holding an individual employee answerable nationwide, simply because of his status as an employee.[22]

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[22] This Court has recognized that "jurisdiction could not be asserted over nonresident individuals solely by virtue of their relationship to a foreign corporation engaged in conduct subjecting it to the jurisdiction of the California courts . . . , where the individual defendant's 'sole business activity was as an employee or officer of the corporation.'" *Quattrone* v. *Superior Court*, 44 Cal. App. 3d 296, 118 Cal. Rptr. 548, 555 (2d Dist. 1975), *citing Sheard* v. *Superior Court*, 40 Cal. App. 3d 207, 114 Cal. Rptr. 743 (1st

Were it to be interpreted otherwise, § 410.10 would violate the Due Process Clause of the Fourteenth Amendment.

* * * *

Appellants flatly misstate the law as respects First Amendment considerations in jurisdictional balancing.

Taking first the federal cases, it is abundantly established that the Supreme Court of the United States routinely considers substantive policy aspects of many different kinds in weighing questions of jurisdiction, and has mandated that this be done. In *Kulko* v. *Superior Court*, *supra*, for example, the Supreme Court in rejecting an assertion of extraterritorial jurisdiction based on a child's intermittent visits to a local parent noted that as a policy matter, to permit jurisdiction "would discourage parents from entering into possible reasonable visitation agreements," and "would impose an unreasonable burden on family relations." Therefore, the Court concluded, assertion of jurisdiction would be "an unwarranted extension of *International Shoe*." 436 U.S. at 93, 96, 98. The same long-standing attention to policy appears in decisions like *Davis* v. *Farmers Co-operative Equity Co.*, 262 U.S. 312 (1923), in which Mr. Justice Brandeis for the Court held, citing the policy of the Commerce Clause, that the burden on interstate commerce would be too great if interstate railroads were subjected to jurisdiction in states where they merely solicited business.[25]

Dist. 1974); *Arnesen* v. *Raymond Lee Organization, Inc.*, 31 Cal. App. 3d 991, 107 Cal. Rptr. 744 (2d Dist. 1973). Likewise, the Ninth Circuit has held that "a corporate officer who has contact with a forum only with regard to the performance of his official duties is not subject to personal jurisdiction in that forum." *Forsythe* v. *Overmyer*, 576 F.2d 779, 783-84 (9th Cir.), *cert. denied*, 439 U.S. 864 (1978); *Chem Lab Products, Inc.* v. *Stepanek*, 554 F.2d 371 (9th Cir. 1977).

* * * *

[25] By parity of reasoning, to subject respondents to extraterritorial jurisdiction in the circumstances of record here would also put an unconstitutional burden on interstate commerce.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

2 Civil No. 65403

(Super.Ct.No. C-305009)

SHIRLEY JONES, *et al.*,
Plaintiffs and Appellants,

v.

IAIN CALDER, *et al.*,
Defendants and Respondents.

Filed Dec. 15, 1982

APPEAL from an order of the Superior Court of Los Angeles County. Eli Chernow, Judge. Reversed.

Hayes & Hume, Paul S. Ablon and Richard P. Towne for Plaintiffs and Appellants.

Williams & Connolly, John G. Kester, F. Lane Heard, Selvin & Weiner and Paul P. Selvin for Defendants and Respondents.

Plaintiffs appeal from an order granting motion to quash out-of-state service of process [1] upon two of the defendants in an action to recover compensatory and punitive damages for libel, invasion of privacy and intentional infliction of emotional distress.

The verified complaint alleges: Defendant National Enquirer, Inc. is a Florida corporation transacting business in California; it publishes the National Enquirer, a weekly periodical of national circulation. Defendant Iain

[1] The order is appealable. (Code Civ. Proc., § 904.1, subd. (c)).

Calder is the editor of the periodical. Defendant John South is a writer employed by the corporate defendant. At all times mentioned, Calder and South acted in the scope of their employment and also acted "by virtue of their own motives as individuals." In the October 9, 1979, issue of the National Enquirer defendants printed and published an untrue and libelous article concerning plaintiffs, Shirley Jones and Marty Ingels.[2] That issue was sold and distributed in the County of Los Angeles, where plaintiffs are well known and enjoy good names and reputations both personally and in their occupations as professional entertainers. In making said publication defendants acted maliciously and with intent to injure, defame and disgrace plaintiffs, place them in a false light, and cause them to suffer humiliation and emotional and physical distress. In their actions directed toward plaintiffs, both before and after publication of said article, defendants caused plaintiffs to suffer great emotional distress. Defendants failed to comply with plaintiffs' demand for publication of a retraction of the defamatory article.

Calder and South are residents of Florida and process was served on them in Florida by mail (Code Civ. Proc., §§ 415.30, 415.40). They appeared specially and moved to quash service of the summons on the ground that the court lacked personal jurisdiction over them.[3] (Code Civ. Proc., § 418.10.) The affidavits of Calder and South in support of the motion state that each is employed by National Enquirer, Inc.—Calder as its president and editor, and South as a reporter; each has his place of business at Enquirer headquarters, located in Florida; neither Calder nor South has ever had an office or place of business in California, or engaged in business there; neither has ever

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[2] Attached to the complaint and incorporated therein by reference is a copy of the article. South's name appears at the end of the article, indicating that he is its author.

[3] Defendant National Enquirer, Inc. did not contest the court's jurisdiction over it, and has answered the complaint.

owned assets, obtained employment or had a bank account in California; Calder performed editorial services in Florida in connection with the article which is the subject of plaintiffs' lawsuit, but did not otherwise participate in the preparation of the article; South performed reporting services in Florida in connection with the subject article; in performing their respective services relating to that article, neither Calder nor South was acting in his personal capacity and neither traveled to California.

In opposition to the motion to quash, plaintiffs filed declarations and excerpts from depositions showing: As president and editor of National Enquirer, Inc., Calder's duties "are to oversee just about every function of the Enquirer . . . to oversee the whole editorial process." Prior to the publication of the allegedly defamatory article concerning plaintiffs, Calder reviewed its evaluation and saw the final page proof form; after publication he determined not to print a retraction. In the three or four years preceding publication of that article, Calder traveled to California only once; that trip was for pleasure, not on business for the National Enquirer. During the same period, South traveled to California more than 20 times on Enquirer business, staying an average of one to two weeks each time. From 1977 to October 1979 Jane Chesis, a California resident, was employed by National Enquirer, Inc. to furnish it with leads for stories. Chesis introduced South to one Bobby Lucas. A year before the subject article was published, South met with Lucas in California on two occasions to discuss possible articles for the Enquirer; during the same period South had 20-25 telephone conversations with Lucas. Lucas provided information for some of the material which appeared in the subject article. By telephone Chesis (in California) supplied South (in Florida) with other material contained in that article. Two or three weeks before the article was published, South telephoned plaintiff Ingels at his home in California and read the article to him; as a result Ingels became emotionally upset and physically ill.

In granting the motion to quash, the trial court (in its memorandum of decision) stated: "From the record in this case, it appears that neither South nor Calder maintained any residence or business office within California. Editor Calder did not enter California nor even make telephone calls into the state during his work on the Ingels article. Reporter South made a few telephone calls into California, including one in which he read the substance of the article to plaintiff Ingels shortly before its publication. In addition, Reporter Smith visited California at least once for purposes relating to the article. The totality of such contacts, in this Court's view, are [*sic*] insubstantial." The Court further determined that in a defamation action such as this, where freedom of the press is involved, "First Amendment considerations should be weighed in the balance of fundamental fairness in resolving whether a state can compel a nonresident defendant to appear and defend an action." The court concluded that such considerations necessitated the granting of the motion to quash.

Plaintiffs contend that the trial court improperly applied a special First Amendment test in determining that the court may not assume jurisdiction over defendants Calder and South. We agree. As authority for its application of such a test, the court cited *New York Times Co.* v. *Connor* (5th Cir. 1966) 365 F.2d 567, wherein it was held that "First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity." (P. 572. See also *Rebozo* v. *Washington Post Co.* (5th Cir. 1975) 515 F.2d 1208, 1214-1215; *Edwards* v. *Associated Press* (5th Cir. 1975) 512 F.2d 258, 266.) This view has been rejected in other federal courts (including those of the Ninth Circuit), which conclude that First Amendment protections are better considered in the context of substantive defenses on the merits than at the initial jurisdictional stage of a defamation proceeding. (*Church of*

Scientology of California v. *Adams* (9th Cir. 1978) 584 F.2d 893, 899; *Anselmi* v. *Denver Post, Inc.* (10th Cir. 1977) 552 F.2d 316, 324, cert. den., 429 U.S. 1041 [50 L.Ed.2d 753, 97 S.Ct. 170].) And in California it has been held that newspapers do not enjoy a special preference under the First Amendment in deciding in personam jurisdiction questions dealing with the publication of allegedly tortious material. (*Sipple* v. *Des Moines Register & Tribune Co.* (1978) 82 Cal.App.3d 143, 148-150 (hg. den.).) After discussing the concurring opinion of Chief Justice Burger in *First National Bank of Boston* v. *Bellotti* (1978) 435 U.S. 765, 796-802 [55 L.Ed.2d 707, 730-734, 98 S.Ct. 1407, 1426-1439], the *Sipple* court stated: "The conclusion of the Chief Justice that the First Amendment fails to give special protection to the 'institutional press' under a freedom of the press theory parallels the finding that it also fails to give special protection from jurisdiction to defendants whose tortious acts performed out of state arise from exercise of rights arguably protected by the First Amendment. Though the *Connor* decision, relied on by respondents, appears to give such protection, that decision 'has been widely criticized and disregarded [citations], and appears now to have been discarded by the Fifth Circuit itself [citations].' (*David* v. *National Lampoon, Inc.* (D.S.C. 1977) 432 F. Supp. 1097, 1100; accord *Anselmi* v. *Denver Post, Inc.* (10th Cir. 1977) 552 F.2d 316, 324.)" (82 Cal.App.3d at p. 149.)

Inasmuch as defendants Calder and South have no special First Amendment privilege by virtue of their status as employees of the publisher of the allegedly defamatory article herein, the right of a California court to assert personal jurisdiction over them must be determined in accord with traditional principles unaffected by First Amendment considerations.

Code of Civil Procedure section 410.10 permits California courts to exercise jurisdiction over nonresidents "on

any basis not inconsistent with the Constitution of this state or of the United States." This statute "manifests an intent to exercise the broadest possible jurisdiction. The constitutional perimeters of this jurisdiction are found in the decisions of the United States Supreme Court." (*Michigan Nat. Bank* v. *Superior Court* (1972) 23 Cal. App.3d 1, 6.) As a general constitutional principle, a court may exercise personal jurisdiction over a nonresident individual so long as he has such minimal contacts with the state that ". . . the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (*Internat. Shoe Co.* v. *Washington* (1945) 326 U.S. 310, 316-317 [90 L.Ed. 95, 101-103, 66 S. Ct. 154]; *Sibley* v. *Superior Court* (1976) 16 Cal.3d 442, 445.) "If a nonresident defendant's activities may be described as 'extensive or wide-ranging' [citation] or 'substantial . . . continuous and systematic' [citation], there is a constitutionally sufficient relationship to warrant jurisdiction for all causes of action asserted against him. In such circumstances, it is not necessary that the specific cause of action alleged be connected with the defendant's business relationship to the forum. [¶] If, however, the defendant's activities in the forum are not so pervasive as to justify the exercise of general jurisdiction over him, then jurisdiction depends upon the quality and nature of his activity in the forum in relation to the particular cause of action. . . . The crucial inquiry concerns the character of defendant's activity in the forum, whether the cause of action arises out of or has a substantial connection with that activity, and upon the balancing of the convenience of the parties and the interests of the state in assuming jurisdiction. [Citations.]" (*Cornelison* v. *Chaney* (1976) 16 Cal.3d 143, 147-148.)

Applying these rules to the instant case, it is clear that California does not have general jurisdiction over defendants Calder and South. Neither defendant has ever owned assets or bank accounts in California, or engaged in business or been employed there. It may not be said

that defendants' activities in California are extensive, wide-ranging, substantial, continuous or systematic. In *Cornelison, supra*, 16 Cal.3d 143, the court considered facts which revealed that the defendant had made 20 trips a year into California over a period of 7 years to deliver and obtain goods, had an independent contractor relationship with local brokers, and was licensed to haul freight by the California Public Utilities Commission; the court failed to find in these facts a basis for general jurisdiction by California courts. If general jurisdiction did not there exist, clearly there can be no general jurisdiction in the present case as a result of defendants' contacts with California consisting of occasional trips to that state. We now proceed to an assessment of the relationship between defendants' activities in California and the causes of action alleged herein.

As the trial court observed, defendant Calder did not enter California or even make telephone calls into the state in connection with his role in the preparation of the subject article; all of his acts with reference to that article apparently were performed in Florida. However, the requisite minimum contacts of a defendant with the forum state need not arise from his physical activity in that state. (*St Joe Paper Co.* v. *Superior Court* (1981) 120 Cal.App.3d 991, 997.) "Every state has a natural interest in effects occurring within its territory, even if the act causing those effects was committed elsewhere. (See Rest.2d Conf. of Laws, § 37, com. a) . . . [¶] If a defendant commits an act or omission outside the forum state *with the intent* to cause a tortious effect within the state, the state may exercise jurisdiction over the defendant as to any cause of action arising from the effects. *The intent to cause tortious injury within the state when the tort actually occurs is generally a sufficient basis, without more, for the exercise of in personam jurisdiction.* 'The act may have been done with the intention of causing effects in the state. If so, the state may exercise the same judicial jurisdiction over the actor, or

over the one who caused the act to be done, as to causes of action arising from these effects as it could have exercised if these effects had resulted from an act done within its territory.' (Rest.2d Conf. of Law, § 37, com. a; see § 36, subd. (1).)" (*Kaiser Aetna* v. *Deal* (1978) 86 Cal.App.3d 896, 902; latter emphasis added. See also Judicial Council Comment, 14 West's Anno. Code Civ. Proc., p. 473; *Quattrone* v. *Superior Court* (1975) 44 Cal.App. 3d 296, 303-304). The complaint herein alleges that defendants, in publishing the defamatory article, acted maliciously and with the intent to injure plaintiffs. The general rule for defamation is that everyone who takes a responsible part in the publication is liable for the defamation. (*McGuire* v. *Brightman* (1978) 79 Cal.App.3d 776, 789.) For the purpose of determining whether a California court may assume jurisdiction over Calder in this lawsuit, it must be presumed that Calder, in participating in the publication of the article as its editor, intended to cause injury to plaintiffs in California where they reside; such injury in fact occurred. Accordingly, a valid basis exists for California's exercise of personal jurisdiction over Calder with respect to the causes of action alleged herein.

In support of a contrary conclusion, defendants cite *Sibley* v. *Superior Court*, *supra*, 16 Cal.3d 442, wherein it is stated (p. 446): "The mere causing of an 'effect' in California . . . is not necessarily sufficient to afford a constitutional basis for jurisdiction; notwithstanding this 'effect,' the imposition of jurisdiction may be unreasonable." *Sibley* was a breach of contract action and it was there held that despite defendant's relationship to California, and the effects thereby caused in California, the exercise of jurisdiction was unreasonable because it did not appear that defendant purposefully availed himself of the privilege of conducting business in California or of the benefits and protections of California laws, that defendant anticipated any economic benefit as a result of his dealings in this state, or that there were any

aspects of the transaction which were subject to special regulation in California. However, such conditions need not be met where jurisdiction is predicated on an act or omission committed outside the forum state with the intent to cause a tortious effect within the state. Thus, in *Abbot Power Corp.* v. *Overhead Electric Co.* (1976) 60 Cal.App.3d 272, an action for intentionally inducing breach of contract, the court, after discussing *Sibley* stated: "There is no reason to require any special circumstances where, as here, the conduct charged is an intentional and malicious tort against a forum-based corporation. The fundamental question is whether the exercise of jurisdiction is fair and reasonable. It is just as reasonable and fair, maybe more so, to subject a defendant to the jurisdiction of a state when it engages in conduct which is purposefully intended to harm a resident of that state as it is to subject a defendant to the jurisdiction of a state when the defendant has sought or anticipated economic benefit in that state from its out-of-state activities." (Pp. 281-282; fn. omitted.)

The foregoing analysis likewise applies to defendant South insofar as his writing and reporting activities in connection with the subject article were performed in Florida. Moreover, apart from the tortious effect which his Florida activities produced in California, South had other contacts with California sufficient to permit the courts of that state to assume personal jurisdiction over him in this action. The record shows that he gathered information appearing in the allegedly defamatory article in the course of at least one visit made by him to California and telephone calls which he made to the state. Expressed differently, the material for the article had its source in California and South tapped that source both by telephone and by personal visits to California. In addition, before the article was published South telephoned plaintiff Ingels at his residence in California and read to him the substance of the article, thereby causing him to suffer emotional distress accompanied by physical illness.

In *Abbot Power Corp.* v. *Overhead Electric Co., supra*, 60 Cal.App.3d 272, it was held that nonresident defendants' sending of letters into California which interfered with plaintiff's contractual relationship constituted the doing of a significant act in California for purposes of exercising jurisdiction over defendants. (P. 279.) By the same token South's telephone call to Ingels, which call was instrumental in the commission of one of the torts of which plaintiffs complain, constituted the doing of a significant act in California. For all of the above reasons, we conclude that South had sufficient minimum contacts with the State of California in respect to the causes of action at issue to justify assumption of jurisdiction by a California court over him in this lawsuit.

Defendants argue that California may not assume jurisdiction over them because they performed the allegedly tortious acts in their respective capacities as officer and employee of the corporate defendant, not as individuals.[4] In support of this contention defendants cite *Bulova Watch Co., Inc.* v. *K. Hattori & Co., Ltd.* (E.D.N.Y. 1981) 508 F. Supp. 1322, wherein it is stated: "Under the 'fiduciary shield' doctrine, the acts of a corporate officer or employee taken in his corporate capacity within the jurisdiction generally do not form the predicate for jurisdiction over him in his individual capacity." (P. 1347. See also *Forsythe* v. *Overmyer* (9th Cir. 1978) 576 F.2d 779, 783-784, cert. den., 439 U.S. 864 [58 L.Ed.2d 174, 99 S.Ct. 188]; *Quattrone* v. *Superior Court, supra*, 44 Cal.App.3d 296, 308.) Defendants' affidavits in support of their motion to quash service of summons state

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[4] In its memorandum of decision, the trial court stated: "It may not be unfair to hold a publisher to account for compensatory and punitive damages in a remote jurisdiction if a sensational story he publishes is false. After all, it is the publisher who balances risk and reward in establishing the character of his publication, and it is the publisher who stands to make substantial profits if he publishes true stories of widespread interest. [¶] It is quite another matter to hold magazine employees to the same accounting. . . ."

that defendants, in performing their services relating to the subject article, were acting on behalf of the National Enquirer, Inc., and not in "a personal capacity." However, as stated in *Donner* v. *Tams-Witmark Music Library, Inc.* (E.D. Pa. 1979) 480 F. Supp. 1229, 1234: "It would be anomalous, and would defeat the purposes of the law creating substantive liability, to permit a corporate officer to shield himself from jurisdiction by means of the corporate entity, when he could not interpose the same shield as a defense against substantive liability. Therefore we hold that Aborn's allegedly tortious conduct in his capacity as president of Tams-Witmark may be considered to determine whether the court has jurisdiction over Aborn as an individual defendant." Unlike Calder, South is an employee rather than an officer of the corporate defendant. That fact, however, does not prevent the assumption of jurisdiction over him in this action. Thus, in *McGuire* v. *Brightman, supra*, 79 Cal.App.3d 776, the court rejected defendant's argument that jurisdiction over him was improper because he was a reporter, not the publisher of the defamatory article. Said the court: "Appellant has cited no authority for any contention that he may have that an author is not a proper defendant in an action for libel printed in a periodical. To the contrary, the general rule for defamation is that everyone who takes a responsible part in the publication is liable for the defamation. [Citation.] And even if appellant could somehow avoid liability for his acts for [the publisher], it would not follow that jurisdiction could not be maintained based upon those acts. Thus, it seems clear that appellant's status as the author instead of the publisher does not create a legal distinction invalidating jurisdiction over him. [Citations.]" (79 Cal. App.3d at p. 789.)

Once it is established that the defendant has the required minimum contacts in the forum state and that the cause of action is sufficiently connected with these mini-

mum contacts, the propriety of an assumption of jurisdiction depends upon a balancing of the inconvenience to the defendant in having to defend himself in the forum state against both the interest of the plaintiff in suing locally and the interrelated interest of the state in assuming jurisdiction. (*Buckeye Boiler Co.* v. *Superior Court* (1969) 71 Cal.2d 893, 899.) Some of the factors involved in this balancing process include the relative availability of evidence and the burden of defense and prosecution in one place rather than another; the interest of a state in providing a forum for its residents; the ease of access to an alternative forum; the avoidance of a multiplicity of suits and conflicting adjudications; and the extent to which the cause of action arose out of defendant's local activities. (*Cornelison* v. *Chaney*, *supra*, 16 Cal. 3d 143, 151; *Fisher Governor Co.* v. *Superior Court* (1959) 53 Cal.2d 222, 225-226.)

In the present case, much of the evidence presumably is in California inasmuch as that is where the causes of action arose, where plaintiffs reside and pursue their careers, and where they are most seriously damaged by the alleged torts; California also is the residence of two of the persons (Chesis and Lucas) who furnished material appearing in the defamatory article published by defendants. The California Supreme Court "has repeatedly emphasized that this state and its residents and taxpayers have a substantial interest in providing a forum where a resident may seek whatever redress is due him. [Citations.] The state also has an interest from the point of view of orderly administration of the laws in assuming juridiction in cases where most of the evidence is within its borders and where a refusal to take jurisdiction may result in multiple litigation. [Fn. omitted.]" (*Hall* v. *University of Nevada* (1972) 8 Cal.3d 522, 525-526.) In their respective capacities as president-editor and reporter-writer for the National Enquirer, Calder and South most likely will be required to appear as wit-

nesses and thus will be present in California regardless of whether a California court assumes jurisdiction over them as defendants. Plaintiff sued National Enquirer, Inc. as well as Calder and South; the corporate defendant has not contested the California court's jurisdiction over it and the action is proceeding against it. If California does not assume jurisdiction over Calder and South plaintiffs may sue them in Florida, resulting in multiple litigation and possible conflicting adjudications. Finally, the torts of which South is accused relate directly to, and arise out of, his local conduct. Under these circumstances, it is fair and reasonable to subject defendants Calder and South to the jurisdiction of the California courts.

The order granting motion to quash service of process is reversed.

CERTIFIED FOR PUBLICATION

LILLIE, J.

We concur:

SPENCER, P.J.

DALSIMER, J.

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

SHIRLEY JONES and MARTY INGELS,
Appellants,

v.

IAIN CALDER and JOHN SOUTH,
Petitioners and Respondents.

Appeal from
Superior Court for the County of Los Angeles
Honorable Eli Chernow, Judge

RESPONDENTS' PETITION FOR HEARING

To the Honorable Chief Justice and to the Honorable Associate Justices of the Supreme Court of the State of California:

Petitioners respectfully pray that this Court grant a hearing of this cause for the reasons stated herein.

ISSUES PRESENTED

On December 15, 1982, the Court of Appeal for the Second District, Division One, reversed the Superior Court's order granting the motion of Florida Respondents Iain Calder and John South to quash service for lack of personal jurisdiction. In holding that Calder and South were subject to California's jurisdiction in this case, the Court of Appeal extended the reach of this state's "long-

arm" statute, Code of Civil Procedure § 410.10, beyond that exercise in any previous case—and beyond the limits imposed by due process. Its decision conflicts with prior holdings of other courts of appeal and of this Court. As now interpreted by the Court of Appeal in this case, § 410.10 violates the due process and free speech guarantees of the California and United States Constitutions, and also unconstitutionally burdens interstate commerce. A hearing in this Court therefore is necessary to end the conflict and to resolve the following important issues:

1. In a suit against two Florida employees of a Florida publishing corporation, may effects caused in California by the publishing corporation be the basis for obtaining extraterritorial personal jurisdiction over the two employees?

2. In determining whether the assertion of extraterritorial jurisdiction offends "traditional notions of fair play and substantial justice," should First Amendment considerations be weighed along with others in deciding whether there is sufficient basis for extraterritorial personal jurisdiction over a Florida editor and reporter?

• • • •

CLERK'S OFFICE, SUPREME COURT
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Feb. 10, 1983

I have this day filed Order HEARING DENIED.

In re: 2 Civ. *No.* 65403

JONES & INGELS

vs.

CALDER & SOUTH

Respectfully,
Clerk

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COURT OF APPEAL
SECOND DIST.
FILED
FEB 16 1983
CLAY ROBBINS JR.
Clerk

IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

Civil No. 65403

SHIRLEY JONES and MARTY INGELS,
Plaintiffs and Appellants,

v.

IAIN CALDER and JOHN SOUTH,
Defendants and Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Iain Calder and John South, Respondents herein, hereby appeal to the Supreme Court

of the United States from the final judgment of this Court entered December 15, 1982, that reversed the order of the Superior Court of the State of California for the County of Los Angeles entered October 2, 1981, quashing service of process on Respondents.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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SUPREME COURT OF THE UNITED STATES

No. 82-1401

IAIN CALDER and JOHN SOUTH,
Appellants,

v.

SHIRLEY JONES and MARTY INGELS

APPEAL from the Court of Appeal of California, Second Appellate District.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

April 18, 1983

Office-Supreme Court, U.S.
FILED
MAR 22 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1401
IN THE

Supreme Court of the United States

October Term, 1982

IAIN CALDER and JOHN SOUTH,

Appellants,

vs.

SHIRLEY JONES and MARTY INGELS,

Appellees.

On Appeal from the California Court of Appeal, Second Appellate District.

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM FOR LACK OF JURISDICTION AND SUBSTANTIAL FEDERAL QUESTION.

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No. 82-1401

IN THE

Supreme Court of the United States

October Term, 1982

IAIN CALDER and JOHN SOUTH,

Appellants,

vs.

SHIRLEY JONES and MARTY INGELS,

Appellees.

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM FOR LACK OF JURISDICTION AND SUBSTANTIAL FEDERAL QUESTION.

Shirley Jones ("Jones") and Marty Ingels ("Ingels"), collectively "Appellees", move pursuant to Rule 16 to dismiss Iain Calder's ("Calder") and John South's ("South") "Statement As To Jurisdiction" ("Statement") for want of jurisdiction on this appeal and failure to present a substantial federal question.

Alternatively, Appellees move that the decision of the California Court of Appeal, Second Appellate District, be affirmed as presenting no substantial issue requiring further argument or consideration and, regardless of the resolution of the issues presented below, there is no unfairness under the facts presented in subjecting Appellants to jurisdiction.

Appellees further request that in the event this Court considers Appellants' statement as a Petition for Certiorari, pursuant to 28 U.S.C. 2103, that it consider this motion in opposition thereto and deny such petition for failure to demonstrate any significant conflict of authority.

I.
THIS MATTER IS NOT WITHIN THIS COURT'S APPELLATE JURISDICTION.

Appellants seek to assert jurisdiction in this Court based upon 28 U.S.C. §1257(2) (Statement, p. 2), which provides jurisdiction:

> "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . and the decision is in favor of its validity."

Appellants argue erroneously that this case requires an examination of the validity of California's "long arm" statute, Code of Civil Procedure §410.10 (Statement, p. 2), which provides:

> "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

However, the clear language of this statute reveals that it is impossible for it to be either unconstitutional on its face or as applied, since it defines California's jurisdiction as coextensive with that permitted by the Federal Constitution as interpreted by the decisions of this Court. The question resolved below was whether, based upon their tortious conduct towards Appellees, the assertion of jurisdiction by California over Appellants was permissible under the due process clause of the United States Constitution.

In *Kulko v. Superior Court*, 436 U.S. 84, 90 n.4 (1977), this Court dealt with the identical statute asserted at bar, and stated as follows:

> ". . . this case was improperly brought to this Court as an appeal, since no state statute was 'drawn in question. . . . on the ground of its being repugnant to the Constitution, treaties or laws of the United States,' 28 U.S.C. §1257(2). The jurisdictional statute construed by the California Supreme Court provides that the State's jurisdiction is as broad as the Constitution permits. See n.3, *supra*. Appellant did not argue below that this statute was unconstitutional, but instead ar-

gued that the Due Process Clause of the Fourteenth Amendment precluded the exercise of *in personam* jurisdiction over him. The opinion below does not purport to determine the constitutionality of the California jurisdictional statute. Rather, the question decided was whether the Constitution itself would permit the assertion of jurisdiction."

A review of the opinion of the California Court of Appeal herein makes clear that it did not purport to determine the constitutionality of CCP §410.10, but merely the requirements of due process as applied to the facts before the trial court. (Statement, Appendix A, Opinion of the Court of Appeal, p. 4a). Accordingly, under *Kulko* appeal to this Court is not proper under 28 U.S.C. §1257(2) and this purported appeal must be dismissed. If, however, the Statement could be construed as a Petition for Certiorari under Rule 17, Appellees submit that at most this Court should consider the Statement as a thinly veiled, unmeritorious petition for certiorari.

II.

THIS COURT'S GRANT OF CERTIORARI IN *KEETON v. HUSTLER MAGAZINE* DOES NOT WARRANT REVIEW OF THIS CASE WHERE NO SUBSTANTIAL FEDERAL QUESTION EXISTS.

Appellants seek to gain this Court's attention by suggestion that this matter is somehow related to *Keeton v. Hustler Magazine, Inc.*, cert. granted, No. 82-485, (January 24, 1983). However, this argument, like Appellants' claim of appellate jurisdiction, is patently meritless.

Other than the fact that *Keeton* is a libel action presenting a personal jurisdiction issue, that case and this case bear no similarity and combining the two cases for hearing will only obscure the clarity of the significant issue *Keeton* presents. A reading of the First Circuit's opinion, 682 F. 2d 33 (1st Cir. 1982)[1] reveals that the issues of a First Amendment jurisdictional preference for the media or employee juris-

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[1]Appellees have not had an opportunity to review the documents filed in this Court in the *Keeton* case.

dictional immunity for wrongful acts done in the course of employment are not even remotely involved in *Keeton*.

The significant issue presented in *Keeton* is whether a state which is not the plaintiff's residence, which was selected exclusively as a forum shopping device to avoid a statute of limitations bar, and which receives less than one percent of the out of state defendant publication's distribution, has in personam jurisdiction over the corporate publisher and an individual California resident who was a principal of that corporation. The Court of Appeals in *Keeton* stated "[t]here is no allegation suggesting that the allegedly defamatory publication was 'aimed exclusively' or primarily at New Hampshire [citation omitted] or that it caused a 'substantial effect' on that state [citations omitted]" at p. 34. In contrast, those are the precise factual allegations and findings presented here.

Appellants' suggestion that the grant of certiorari in *Keeton* warrants the granting of hearing or certiorari at bar and that hearing of the two cases should be scheduled at the same time is inappropriate.

III.
STATEMENT OF FACTS.

Appellants' Statement (pp. 3-5) fails to include many jurisdictionally relevant facts relied upon by the California Court of Appeal and misstates and downplays others. Furthermore, from the lengthy record below, it is significant that Appellants have chosen to provide this Court with only their short, self-serving, attorney prepared affidavits. (Statement, Appendices E and F). Thus a complete statement of the relevant facts before the lower courts is appropriate.

In September of 1979, South, both a writer and reporter for defendant, National Enquirer, Inc. ("Enquirer") (C.T. 55; 143-145)[2] telephoned Appellees at their home in Beverly Hills, California and read to Ingels a virtually identical draft

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[2]All references to "C.T." are to the Clerk's Transcript prepared for and transferred to the California Court of Appeal in this matter which references appear in the briefs filed in the lower court.

of a libelous and defamatory gossip article. (C.T. 171).[3] The headline and content of the article ("Article") make apparent its pernicious intent and capacity. (A copy of the Article is attached as Appendix A hereto).

After leaving the telephone to be physically sick, Ingels returned and denied to South each and every malicious and untrue element of the proposed Article (C.T. 171). Nevertheless, advised of the falsity of the Article, on or about October 9, 1979, the Enquirer published the Article,[4] at the direction of Calder, the editor and president of the Enquirer (C.T. 53), whose duties by his own testimony were, as president, to "oversee just about every function of the Enquirer" (C.T. 89), and, as editor, to "oversee the whole editorial process" (C.T. 90), which latter function encompassed, of course, specific approval for publication of the Article, the final page proof of which he saw and approved. (C.T. 94).[5] Calder also personally made the decision not to retract the Article after Appellees' demand that he do so. (C.T. 95-96).

South's other contacts with California were significant. His by-line appeared on the Article (C.T. 6) which he was primarily responsible for concocting. (C.T. 142-147). In conducting his "investigation" of the Article, he had several telephone conversations with persons in California, including more than one with an acknowledged "source" for the Article, and personal friend, Jane Chesis, (C.T. 150, 157-158, 165); he was provided with at least five California telephone numbers of persons who could provide him with

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[3]This is apparently the telephone conversation which Appellants characterize as "a single telephone call to one Appellee" (Statement, p. 16), without alluding to the fact that this call, even without subsequent publication of the Article, constituted commission of the tort of intentional infliction of emotional distress in California. *Moore v. Green*, 431 F. 2d 584 (9th Cir. 1970).

[4]This publication led to initiation of this lawsuit on November 20, 1979, by Appellees against Appellants, the Enquirer and Sunset News Company (the Enquirer's California distributor) for libel, invasion of privacy and intentional infliction of emotional distress. (C.T. 1-7).

[5]Appellants minimize these crucial management and supervisorial functions characterizing them as "routine editorial services." (Statement, p. 4).

information about Appellees (C.T. 139-140), which numbers one can infer he called; he had at least twenty (20) telephone conversations with John Robert Lucas, another reputed California "source" for the Article (C.T. 147-148) in the year preceding publication of the Article (C.T. 107);[6] and he had at least six (6) meetings in California with Lucas, at least two of which meetings were prior to publication of the Article for which Lucas was a primary source. (C.T. 101-102; 104-105).

Based upon the detailed deposition abstracts presented below, even the trial court, which ruled against Appellees, was forced to conclude:

> "In addition, it may fairly be inferred from the record before the Court that Reporter South visited California at least once for purposes relating to the article." (Statement, Appendix C, Opinion of Superior Court, p. 16a).

The Court of Appeal reviewing the record reached the same conclusion:

> "The record shows that he [South] gathered information appearing in the allegedly defamatory article in the course of at least one visit made by him to California . . ." (Statement, Appendix A; Opinion and Judgment of the California Court of Appeal, p. 9a).

Despite the clear evidence from which the legitimate inference of South's visit to California related to the Article could be drawn, Appellants characterize this factual finding as "hypothesized." (Statement, p. 5, n. 6; p. 7; p. 16, n. 15). Appellants' contention that South's affidavit (stating he did not travel to California) was not countered by the evidence (Statement, p. 5, n. 6; p. 16, n. 15), is ironic indeed. The inference from the deposition testimony was strong enough to rebut it. Further, the only reason even stronger evidence was not presented was because inquiry

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[6]Appellants, with no support in the record or in South's Declaration (Statement, p. 25a), arbitrarily state that there were only three investigation related telephone calls to California. (Statement, pp. 5, 16). In fact, the evidence suggests there were many more.

as to whether the meetings with Lucas related to the subject Article was precluded by Appellants' counsel's objection and instruction not to answer that information on grounds of a claimed newsman's source privilege. (C.T. 105-106).

In addition to the Article related contacts, South had other significant contacts with California. In the four years prior to publication, he made between twenty (20) and forty four (44) trips to California on Enquirer business averaging one to two weeks (C.T. 102-103),[7] and on one such trip he sought alternative employment in California since "he had to travel so much out here, it would give him more time with his children if he obtained employment here." (C.T. 155). On another trip to California, after publication of the subject article, South met with Jane Chesis to discuss her deposition in this lawsuit. (C.T. 130-131). South also had a dozen business acquaintances in California unrelated to Enquirer business (C.T. 103), clearly suggesting his business dealings with that state.[8]

Though Respondents have no knowledge of Calder's personal appearances in California in connection with this matter, he was in personal attendance during virtually the duration of the trial in the matter of *Carol Burnett v. National Enquirer, Inc.*, Los Angeles Superior Court No. C157213 (C.T. 261), during March, 1981, demonstrating both his knowledge that articles relating to celebrities in California would likely lead to litigation there and the relative convenience of his defending an action in that forum.

Noticeably absent from the Statement are the critical facts which distinguish this case from others: the presence of wrongful conduct which is alleged to be willful, malicious and intentional (C.T. 1-5), and the consequences of which were knowingly directed at California and therefore fore-

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[7] Appellants fail to advert in their Statement to the outer limit figure of forty four, which the evidence supports, nor to the average one to two week duration of the trips. (Statement, p. 5).

[8] This tends to negate the conclusory statement in South's declaration that he never engaged in any business activity in California in his personal capacity (Statement, Appendix F, Affidavit of South, p. 25a).

seeably related to that state. It was completely foreseeable that Appellants would be called upon to defend this case in California, where they knew Appellees resided (C.T. 171), where they knew the subject of the Article (Appellees' professional endeavors) was located, where the Enquirer's largest circulation in any state occurred (in excess of 500,000 copies per issue (C.T. 110-122)), and where they knew other lawsuits by celebrities had been filed.

IV.
STATEMENT OF THE CASE.

A. The Superior Court.

The trial court agreed with appellees that application of traditional jurisdictional principles would clearly subject Appellants to jurisdiction. It stated:

> "Indeed, if the injury complained of in this case involved a physical injury sustained as a result of a physically defective magazine shipped into California, then the analysis would end at this point and the motion to quash would be denied. *Buckeye Boiler v. Superior Court*, 71 Cal. 2d 893 (1969)." (C.T. 527) (Statement, Appendix C, Opinion of Superior Court, p. 17a).

However, the trial court did not conclude its analysis at this juncture, but rather continued:

> "The question presented by this case is whether further consideration is required because the case involves First Amendment freedom of expression and because the defendants sought to be brought into this jurisdiction are employees of the publisher . . . . The question becomes, then, whether, in assessing the fundamental fairness of the proposed assertion of jurisdiction, the Court should weigh and consider additional factors in cases where freedom of the press is involved." (C.T. 527-528) (Statement, Appendix C, Opinion of the Superior Court, p. 17a).

Only after according Appellants this unwarranted special First Amendment consideration did the trial court conclude that it could not exert jurisdiction.

B. The California Court of Appeal.

The California Court of Appeal, Second District, Division One, in a cogent, unanimous opinion agreed with the trial court that traditional jurisdictional analysis justified jurisdiction over Appellants.[9] However, relying on the uncontradicted California authority and the clear and overwhelming weight of authority in other jurisdictions, it rejected the trial court's conclusion (CT. 527-528) that there was some special jurisdictional preference required in a "First Amendment case." Rather, the Court of Appeal concluded that First Amendment considerations are better dealt with in the context of the substantive law (as this Court has done in *New York Times v. Sullivan*, 376 U.S. 265 (1964) and its progeny) and not in connection with unrelated procedural issues. (Statement, Appendix A, Opinion of the California Court of Appeal, p. 4a). Relying on the California case of *Sipple v. Des Moines Register and Tribune Co.*, 82 Cal. App. 3d 143, 148-150, 147 Cal. Rptr. 59 (1978) and decisions of several circuit courts including the Ninth Circuit, particularly *Church of Scientology of California v. Adams*, 584 F. 2d 893, 899 (9th Cir. 1978), it concluded that jurisdiction over South and Calder "must be determined in accord with traditional principles unaffected by First Amendment considerations." (Statement, Appendix A, Opinion of California Court of Appeal, p. 5a).

In applying these traditional principles, the Court of Appeal acknowledged that "[e]very state has a natural interest in effects occurring within its territory, even if the act causing those effects was committed elsewhere. (See, Rest. 2d Conf. of Laws, §37, com. a.). . . . [¶] If a defendant commits an act or omission outside the forum state *with the intent* to cause a tortious effect within the state, the state may exercise jurisdiction over the defendant as to any cause of action arising from the effects. *The intent to cause tortious injury within the state when the tort actually occurs is generally a sufficient basis, without more, for the exercise of*

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[9]This opinion was published and reported at 138 Cal. App. 3d 128, 187 Cal. Rptr. 825 (1982).

in personam jurisdiction." (Statement, Appendix A, Opinion of California Court of Appeal, p. 7a) (emphasis in original). The tortious effects caused by Appellants in California were alone sufficient to justify jurisdiction over them, though South's contacts were sufficient to impose jurisdiction over him even without resort to the "intentional effects" principle. (Statement, Appendix A, Opinion of California Court of Appeal, p. 9a).

The Court of Appeal concluded that jurisdiction over South and Calder was not affected by the fact that they intentionally engaged in the wrongful and malicious conduct in the course of their employment with the Enquirer. Such employment provided them no immunity for their intentional wrongdoing, since:

> " '[T]he general rule for defamation is that everyone who takes a responsible part in the publication is liable for the defamation. [citation]. And even if appellant could somehow avoid liability for his acts for [the publisher], it would not follow that jurisdiction could not be maintained based upon those acts. Thus, it seems clear that appellant's status as the author instead of the publisher does not create a legal distinction invalidating jurisdiction over him. [citations].' " (Statement, Appendix A, Opinion of California Court of Appeal, p. 11a).

Only after establishing that Appellants had the requisite minimum contacts with California so as to justify exercise of jurisdiction did the court balance the possible inconvenience to them against plaintiff's interests in suing in California, and conclude that California was a proper place for jurisdiction. (Statement, Appendix A, Opinion of California Court of Appeal, p. 11a).

C. The California Supreme Court.

The California Supreme Court denied hearing (Statement, Appendix B) signifying under California Rules of Court, Rule 29 that a hearing did not appear "necessary to secure uniformity of decision or the settlement of important questions of law."

V.

THE ISSUES PRESENTED, IN LIGHT OF ALL OF THE FACTS AND THE PROCEDURAL POSTURE OF THIS CASE, REVEAL THAT NO SUBSTANTIAL FEDERAL QUESTION EXISTS TO REQUIRE THIS COURT'S REVIEW.

The issues raised below are not as Appellants characterize them, and they are not substantial enough to warrant examination by this Court. Simply stated, they are:

1. Must a special First Amendment jurisdictional privilege be accorded to members of the press who engage in intentionally tortious conduct outside of California which conduct results in sending into California a product which causes injury there?[10]

2. Can significant participants in wrongdoing outside of California aimed at residents of that state evade jurisdiction simply because the intentional wrongdoing was accomplished while working for a corporate employer?

VI.

THE CREATION OF A JURISDICTIONAL PREFERENCE ALLOWING MEMBERS OF THE MEDIA TO EVADE STATE JURISDICTION BASED ON THEIR PARTICIPATION IN INTENTIONAL AND MALICIOUS CONDUCT DIRECTED AT STATE RESIDENTS IS NOT A SIGNIFICANT ISSUE DIVIDING THE COURTS.

Appellants urge that there is significant conflict among the federal circuit courts on whether it is *improper* to consider the First Amendment in jurisdictional analysis,[11] and that this Court should adopt a special jurisdictional preference for non-resident members of the media.[12] However, the alleged "widening" split of authority (Statement, p. 9)

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[10]Appellants characterize this issue as whether it is *improper* to give weight to the First Amendment in jurisdictional analyses. However, since the California Court of Appeal has ruled that it chooses not to give such special First Amendment weight, only if the Constitution requires that special treatment *must* be accorded can the California Court of Appeal be reversed.

[11]See n. 10, *supra*.

[12]Appellants do not indicate whether they would reserve this special treatment for the institutional press, all publishers, reporters or anyone exercising a First Amendment right.

is more apparent than real and is created only by Appellants' overzealous efforts to convince this Court that a basis for its appellate jurisdiction exists.

A. United States Supreme Court Precedent.

This Court has never held nor remotely suggested that defendants in libel cases must be accorded a special jurisdictional preference. In contrast, this Court has gone far in protecting the press and other defamation defendants by means of significant protections incorporated in the substantive constitutional law of libel (See, *New York Times v. Sullivan, supra; Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)). These cases reflect the wise determination that First Amendment issues are best directly confronted in consideration of the substantive law of libel rather than by indirection in jurisdictional or other procedural analyses. Furthermore, this Court's decisions in the substantive law of libel have achieved a fine balance of interests amply protecting libel defendants. Additional procedural protections would upset this balance and is otherwise unwarranted and unneeded.

Chief Justice Burger in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 802 (concurring opinion) reflected the reluctance to elevate the press into a privileged institution where not otherwise warranted. He stated:

> " '[T]he purpose of the Constitution was not to erect the press into a privileged institution' . . . the liberty of the press is no greater and no less '. . . than the liberty of every citizen of the Republic [citation omitted]' "

Although stated in connection with the freedom to publish, the granting of unwarranted privilege to the press is equally applicable to a jurisdictional privilege.

B. This Issue Is Marked by a Uniformity of Judicial Opinion.

It is only by counting the opinions of federal district courts as those of the circuit in which they sit (Statement, pp. 10-12) that Appellants can make their exaggerated

claims of a clear split of authority among the federal circuits on the existence of a special jurisdictional preference in First Amendment cases.

In fact, however, a careful review of Appellants' authorities makes clear that the sole source of such authority among the federal circuit courts of appeal is the Fifth Circuit prior to its recent division. *See, e. g., Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964); *New York Times v. Connor*, 365 F.2d 567 (5th Cir. 1966); *Wolfson v. Houston Post Co.*, 441 F.2d 735 (5th Cir. 1971); *Edwards v. Associated Press*, 512 F.2d 258 (5th Cir. 1975) and *Cox Enterprises, Inc. v. Holt*, 678 F.2d 936 (11th Cir. 1982).[13]

Although they suggest that "The Fifth, Eleventh, and *D.C. Circuits* hold . . ." (Statement, p. 10, emphasis added) that First Amendment considerations are required in jurisdictional analysis, Appellants cite no D.C. Circuit court case holding to that effect.[14] The balance of federal cases cited are all district court cases[15] which contain occasional language to similar effect in otherwise inapposite opinions. *See, e.g., McCabe v. Kevin Jenkins and Associates, Inc.*, 531 F. Supp. 648 (E.D.Pa. 1982).[16] *Margoles v. Johns*, 333 F. Supp. 942 (D.D.C. 1971), aff'd. 483 F. 2d 1212 (D.C. Cir. 1973);[17] and the unpublished slip opinion in *Gonzales v. Atlanta Constitution, supra.*[18]

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[13]Appellants seek to benefit by the recent creation of the Eleventh Circuit out of the Fifth, apparently hoping that the divison of circuits will create a multiplicity of authority, despite the fact that the *Cox* court considered itself bound by "applicable law previously developed in the former Fifth Circuit." 678 F.2d at 937.

[14]The D.C. Circuit case of *Margoles v. Johns*, 483 F. 2d 1212 (D.D.C. 1971), upon which Appellants apparently rely for this assertion, does not so much as comment on whether the First Amendment affects jurisdictional analysis.

[15]At least one of these was not even officially reported. *Gonzalez v. Atlanta Constitution*, 4 Media L. Rptr. 2146 (N.D. Ill. 1979).

[16]This case turns on the long arm statute of Pennsylvania and substantially lesser contacts.

[17]The *Margoles* case was decided as a matter of interpretation of a Washington, D.C. long-arm statute which was not as broad as California's and at any rate its favorable reference to *N.Y. Times v. O'Connor, supra*, was not commented upon nor referred to by the circuit court opinion.

[18]This unpublished district court opinion relies without analysis on the much discredited *Connor* case.

Even the only federal circuit embracing this special jurisdictional preference, the Fifth (and its successor the Eleventh), has qualified its significance. *Curtis Publishing Co. v. Golino*, 383 F.2d 586, 590-591 (5th Cir. 1967), distinguishing *New York Times v. Connor, supra*, limiting it to newspapers and asserting its inapplicability to magazines. *Edwards v. Associated Press*, 512 F. 2d 258, 266 (5th Cir. 1975), said that *Connor* "indicates not so much a rule as it expresses a cautionary note." *Edwards* further acknowledged that Connor "has not been greeted with enthusiasm" (512 F. 2d at p. 266, n. 29) citing *Buckley v. New York Post Corporation*, 373 F. 2d 175 (2d Cir. 1967) in support of that proposition.[19]

In fact, in *David v. National Lampoon*, 432 F. Supp. 1097, 1100 (D.S.C. 1977), a district court case within the Fourth Circuit, the Court properly disregarded the *Connor* cautionary note:

> "This court can see no real legal distinction between a publisher who causes a publication which allegedly harmed the plaintiff to be distributed in the state and a manufacturer who ships an allegedly defective product into the state."

This is so because the principles of long arm jurisdiction set forth in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and subsequent cases are:

> ". . . equally applicable whether the alleged potential for harm is latently concealed in a household appliance, a can of food or a printed page. All are different types of products capable of producing different types of harm, but all are identical for purposes of jurisdictional analysis." 432 F. Supp. at 1100.

Finally, the only commentators Appellants cite in support of its claim, Weinstein and Leflar (Statement, p. 11, fn. 12), wrote prior to *New York Times v. Sullivan, supra*, and

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[19]Significantly, Appellants' count *Buckley* among its number of supporting circuits though the Fifth Circuit itself was aware of *Buckley's* critical view of *New York Times v. Connor* position.

thus before this Court accorded additional First Amendment protection to defendants in libel cases.

Weighed against Appellants' scant and inapposite federal authority, Appellees' federal authorities which rightly criticize the Fifth Circuit cases cited above are impressive in scope and logic. *See, Church of Scientology of California v. Adams*, 584 F. 2d 893, 899 (9th Cir. 1978), (where the court observed that the proposition that there is increased protection from jurisdiction in First Amendment cases is one whose ". . . soundness is opened to question. . . . We observe that First Amendment protections are better developed in the context of substantive defenses on the merits rather than at the initial jurisdictional stage of a defamation proceeding"); *Anselmi v. Denver Post*, 552 F. 2d 316, 324 (10th Cir. 1977) (which after citing *Buckley v. New York Post*, 373 F. 2d 175, 182 (2d Cir. 1967), stated: "Whether there is a First Amendment defense is to be determined when the case is tried and ought not as a matter of reason and logic affect the outcome of a personal jurisdiction questions such as we have here. . . . To hold as did the Fifth Circuit that the First Amendment has to be thrown on the scales as an added impediment in media cases gives to the media an additional arrow which is not appropriate in a determination as to whether the contacts are legally sufficient to constitute due process"); *Buckley v. New York Post, supra*, (where Judge Friendly pointedly observed: "We cannot but wonder whether the *Connor* court would have felt the same way if the *dramatis personae*, instead of being "Bull" Connor and a newspaper internationally known for its high standards, had been an esteemed local educator of clergyman and *an out-of-State journal with a taste for scandal* which had circulated 395 copies of a libel stating he had corrupted the morals of the young" (emphasis added)); *Johnstone v. Time, Inc.*, 321 F. Supp. 837, 846 (D.N.C. 1970) (court considered the changes to substantive defamation law made in *New York Times v. Sullivan* and stated: "Therefore, the necessity of granting the First Amendment a weighty consideration in the determination of whether a certain forum has jurisdiction over a defendant publisher is

not as great . . ."); *Cordell v. Detective Publications, Inc.*, 307 F. Supp. 1212, 1216 (E.D. Tenn. 1968), (which after discussing *New York Times v. Connor, supra*, stated: "The court is of the opinion that a better approach to this problem is set forth in the opinion of the Court of Appeals for the Second Circuit in *Buckley v. New York Post* (C.A. 2, 1967), 373 F. 2d 175. Judge Friendly in that case reasoned that the free press considerations could best be effectuated by divorcing them from problems of due process under the Fourteenth Amendment"); *Novel v. Garrison*, 294 F. Supp. 825, 833 (N.D. Ill. 1969), ("[t]he soundness of applying these First Amendment considerations to jurisdiction questions has been questioned."); *David v. National Lampoon, Inc.*, 432 F. Supp. 1097 (D.S.C. 1977); *see, also, Long-Arm Jurisdiction Over Publishers: "To Chill A Mocking Word"*, 67 Colum. L. Rev. 342 (1967); "*Due Process In First Amendment Considerations In Libel Cases*," 52 Iowa L. Rev. 1034 (1967); and, "*Constitution Limitations To Long-Arm Jurisdiction In Newspaper Libel Cases*, 34 U. Chi. L. Rev. 436 (1967).

C. Even if a First Amendment Jurisdictional Preference Were Required, Appellants Would Be Subject to Jurisdiction Based Upon Their Intentional Wrongdoing.

Even if a higher jurisdictional standard of analysis is applicable in libel cases, that higher standard would be satisfied at bar, since:

(a) Appellants acted knowing the Enquirer has significant circulation in California (*Buckley v. New York Post Corporation, supra*);

(b) Appellants acted knowing the defamatory and invasive article was directed specifically to California readers through the Enquirer's extensive California distribution (*Edwards v. Associated Press, supra*);

(c) The article was of such particular interest in California that it was at least foreseeable and probably intended that it would be given substantial attention

there (*Edwards v. Associated Press, supra, Anselmi v. Denver Post, Inc., supra*);

(d) The Enquirer is a magazine (C.T. 244-256) rather than a newspaper and thus Appellants are not subject to the same "chilling effects" from periodic lawsuits. (*Curtis Publishing Co. v. Golino, supra*, at 592-3); and

(e) Appellants, and particularly South, had significant and substantial contacts with California; (*McGuire v. Brightman*, 79 Cal.App.3d 776, 145 Cal. Rptr. 256 (1978)).

Thus, even if the issue of whether the news media are entitled to a special First Amendment jurisdictional preference were a substantial one, which it is not, or was in conflict among the federal circuits courts, which it is not, the resolution of that issue either way would not and should not affect the outcome in this matter.

VII.

THE CALIFORNIA COURT OF APPEAL'S HOLDING THAT SIGNIFICANT OUT-OF-STATE PARTICIPANTS IN INTENTIONALLY WRONGFUL CONDUCT HAVING INJURIOUS EFFECTS ON RESIDENTS OF CALIFORNIA ARE NOT JURISDICTIONALLY IMMUNE BECAUSE THEIR WRONGFUL CONDUCT WAS DONE WHILE WORKING FOR A CORPORATE EMPLOYER PRESENTS NO NOVEL OR SIGNIFICANT ISSUE FOR THIS COURT.

Appellants contend "that personal jurisdiction over a corporation does not carry with it personal jurisdiction over individual out-of-state employees." (Statement, p. 15). However, neither Appellees nor the California Court of Appeal suggests that jurisdiction over an out-of-state corporation automatically includes jurisdiction over its employees regardless of their individual connection with the forum state. Were that the real issue, Appellees acknowledge that serious due process questions might arise. However, the correct issue presented and resolved by the California Court of Appeal is simply whether because one is an employee of a corporation, one is automatically insulated from jurisdiction even for intentionally wrongful

acts actually done by him, albeit on behalf of his corporate employer.

On this issue, Appellants' authorities are not supportive. Most emanate from New York or from jurisdictions containing long arm statutes much narrower than California's with a shorter reach than that permissible under the Fourteenth Amendment. Furthermore, logic suggests that the existence of a jurisdictional "fiduciary shield" for corporate employees is simply a matter of state law presenting no constitutional dimensions whatever. If a defendant's contacts with a forum render it fair to subject him to jurisdiction, it is unclear why those same acts done on behalf of a corporate employer should then become an unfair basis of jurisdiction. This is particularly so when the acts constitute intentional wrongdoing.

Appellants primarily rely on *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1347 (E.D.N.Y. 1981), *Grove Press, Inc. v. CIA*, 483 F. Supp. 132, 135 (S.D.N.Y 1980); and *Marine Midland Bank v. Miller*, 664 F. 2d 899, 903 (2d Cir. 1981), which appear to articulate a "fiduciary shield" doctrine shielding officers and employees from jurisdiction based upon acts which they performed in their corporate capacity. However, as stated in *Marine Midland Bank, supra*, and as suggested in logic, that doctrine:

> "is not a constitutional principle, but is rather a doctrine based on judicial inference as to the intended scope of the long arm statute [of New York]." 664 F. 2d at 902, footnote 3.

Since the reach of California's long-arm statute is coextensive with constitutional limits, it does not impose such a restriction.

The suggestion of Appellants that the California Court of Appeal explicitly recognized (Statement, p. 10a) that in permitting personal jurisdiction over an out-of-state employee for acts done outside the state for the corporate employer, its holding conflicts with that of the Ninth Circuit in *Forsythe v. Overmeyer*, 576 F. 2d 779 (9th Cir.) cert. den., 439 U.S. 864 (1978) (Statement, p. 13), could not

be more inaccurate. First, the California Court of Appeal in its discussion of jurisdiction over corporate employees, merely referenced *Forsythe* by the use of the signal "See also," suggesting only that that case said something on this point while not recognizing any explicit or tacit conflict with the position it was taking.[20] Furthermore, the language in *Forsythe*, suggesting the proposition for which Appellants cite it, is mere dictum and not as they characterize it, a "holding."[21] Additionally, *Forsythe* dealt with an issue of whether an obligor on a personal guaranty was subject to jurisdiction, a totally different nontortious matter than that presented at bar, where an employee's significant, direct and voluntary participation in intentional tortious conduct outside of a state aimed therein is alleged.[22] Finally, in support of the proposition under discussion *Forsythe* cites only the one-half (½) page opinion of *Chem-Lab Products, Inc. v. Stepanik*, 554 F. 2d 371 (9th Cir. 1977),[23] which case found no "personal acts" with California, making clear that personal acts meant contact with California on behalf of a corporation or otherwise.

Other federal cases cited by Appellants are equally inapposite. For example, *Idaho Potato Commission v. Washington Potato Commission*, 410 F. Supp. 171 (D. Ida. 1975), relies primarily on the New York authorities, which as above stated recognize the fiduciary shield as a matter of statutory construction; *Stop-A-Flat Corp. v. Electra Start of Michigan, Inc.*, 507 F. Supp. 647 (E. D. Pa. 1981),

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[20]According to the standard reference "A Uniform System of Citation", Rule 2:3 (Harv. L. Rev. Assoc. 12th Ed., 1976), the signal "See also" indicates that the "Cited Authority provides background to a question analogous to that examined in text, which can profitably be compared with it."

[21]"*Moreover*, a corporate officer who has contact with a forum only with regard to the performance of his official duties is not subject to personal jurisdiction in that forum [citation omitted]" 576 F. 2d at 783-784 (Emphasis added).

[22]This is of course the very significant fact that Appellants have ignored throughout their Statement.

[23]Appellants heavily rely on this case only after misstating the proposition for which it stands.

relies primarily upon a case considering a long arm provision substantially narrower than California's; *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F. 2d 902 (1st Cir. 1980), a non-intentional tort case based upon a narrower Puerto Rican statute providing jurisdiction if "(1) Such person or his agent carries out business transactions within Puerto Rico"; *Weller v. Cromwell Oil Co.*, 504 F. 2d 927 (6th Cir. 1974), a case of construction of Ohio's long arm statute rather than constitutional interpretation: "In this appeal, we construe Ohio's long arm statute . . . (at p. 928) and "we are not willing to extend the Ohio long-arm statute to cover this case." (at p. 931.) At any rate its statement with regard to employees' susceptibility to jurisdiction for acts done on behalf of a corporate employer was only dictum; *Wilshire Oil Co. of Texas v. Riffe*, 409 F. 2d 1277 (10th Cir. 1969), a suit by a corporation against *its own former employees* related to their acts when employed, also relied on New York cases, dealt with a narrower long arm statute than California and was only dictum saying, "nonetheless, we do not deem it necessary to decide the matter solely on that basis [fiduciary shield]" instead, finding inherent weakness in the defendants' contacts with the forum and the connection of those contacts with the cause of action.

Those opinions cited by Appellants which might fairly support a claim of due process jurisdictional immunity for intentional tortious activity conducted in the course of one's corporate employment are simply wrong for the reasons above discussed.[24]

The only California state court decision dealing with this issue is *Quattrone v. Superior Court*, 44 Cal. App. 3d 296, 118 Cal. Rptr. 548 (1975), where a non-resident individual defendant was subjected to California jurisdiction though all of his acts were performed outside of that state on behalf of a Pennsylvania corporation.

The California Court of Appeal, in its opinion below, cited Judge Becker's reasoned discussion of the anomaly

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[24]*See, State Security Ins. Co. v. Frank B. Hall, Inc.*, 530 F. Supp. 94 (N.D. Ill. 1981).

presented by the corporate shield doctrine in *Donner v. Tams-Witmark Music Library, Inc.*, 480 F. Supp. 1229, 1233 (E. D. Pa. 1979). It would make no sense for state policy to subject an employee to liability for his intentional wrongful acts on behalf of his employer, while at the same time according him a jurisdictional immunity making it easier for him to evade answering for those very acts. For other criticism of the corporate shield doctrine, *See, Lighting Systems, Inc. v. International Merchandising, Inc.*, 464 F. Supp. 601 (W. D. Pa. 1979); *Leshko v. Don-Oliver, Inc.*, 86 F.R.D. 343 (M. D. Pa. 1979); and *McGuire v. Brightman*, 79 Cal. App. 3d 776 (1978) (subjecting the individual defendant to jurisdiction though he at all times acted for his corporate employer). At most it can be said that the fiduciary shield doctrine is a matter of state law and policy and hardly a constitutional mandate.

VIII.

APPELLANTS' INTENTIONAL ACTS WHICH LED TO THE INJURY OF APPELLEES ARE SUFFICIENT TO WARRANT JURISDICTION IN CALIFORNIA.

As set forth in the Rest. 2d Conf. of Law §37, com. a:

> "If a defendant commits an act or omission outside the forum state with the intent to cause a tortious effect within the state, the state may exercise jurisdiction as to any cause of action arising from the effects. The intent to cause tortious injury within the state when the tort actually occurs is generally a sufficient basis, without more, for the exercise of in personam jurisdiction."

At bar, the facts are more compelling since it was unavoidable that the out of state acts of Appellants would cause an effect in California. The largest number of copies of the defamatory item were expected to be distributed in California and it was known that Appellees resided in California. The harmful effects of Appellants' acts were the very effects desired. This element of foreseeability of the injury caused has been frequently determined to be a key ingredient in asserting jurisdiction based upon the effects of tortious conduct. *See, e.g., Novel v. Garrison*, 294 F. Supp. 825 (N. D. Ill. 1969); *Pegler v. Ed Sullivan*, 432 P. 2d 593 (Ariz.

App. 1967); *Church of Scientology v. Adams*, 584 F. 2d 893 (9th Cir. 1978).

Furthermore, there is no unfairness in subjecting such intentional participants in wrongdoing from jurisdiction in the very state where it was known and foreseen that the injury would occur, particularly since many states find that tortious effects alone, even unintentionally caused, may be sufficient. *See, e.g., Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.W. 2d 761 (1961); *McBride v. Owens*, 454 F. Supp. 731 (S.D. Tex. 1978); *Western Desert, Inc. v. Chase Resources Corp.*, 460 F. Supp. 63, 65 (N.D. Tex. 1978) (Vernon's Ann. Tex. Civ. St. Art. 2031b); *David v. National Lampoon, supra* (S.C. Code §10.2-803); *Cole v. Doe*, 77 Mich. App. 138 (1978) (Mich. Stat. Ann. §27A. 705).

IX.
CONCLUSION.

In the *New York Times v. Sullivan, supra*, line of cases, the media claimed that being held responsible for defamation without according due deference to the First Amendment would chill their speech. This court then properly adjusted the substantive law of libel to balance the interests of defamed individuals and the media.

Now Appellants come to this court claiming that merely having to respond to defamation lawsuits in a forum where they themselves choose to cause injury would chill their speech. This is of course only the precursor to a claim that having to defend such lawsuits anywhere has a chilling impact on the media.

However, whatever mild chill may be occasioned in this case there is no jurisdictional immunity for publication of defamatory falsehoods mandated by the federal constitution which could or should permit Appellants to avoid California's jurisdiction. Since this issue has been properly resolved

(c) The article was of such particular interest in California that it was at least foreseeable and probably intended that it would be given substantial attention there (*Edwards v. Associated Press, supra, Anselmi v. Denver Post, Inc., supra*);

Dated: March 21, 1983.

Respectfully submitted,

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APPENDIX A.

Husband's Bizarre Behavior Is Driving Shirley Jones to Drink

Shirley Jones' husband, Marty Ingels, is acting like a crazy man — and Shirley has been driven to drink by his bizarre behavior, insiders say.

They also reveal that Ingels — a producer of TV commercials — has terrorized his staff, cheated stars, outraged advertisers and scandalized Hollywood.

Sadly, they charge that it's gotten so bad that Shirley is barely able to make it through the day. And millions of fans of her new TV show, "Shirley," don't realize that the seemingly bubbly star is really crying on the inside.

'By 3 in the Afternoon She's a Crying Drunk'

"Marty Ingels has driven Shirley to drink," charged an inside source who visited the set and spoke with crew members.

"She pours down vodka so fast that at first the crew thought she was drinking water.

"She starts blurring her lines and by 3 o'clock in the afternoon she's a crying drunk and they have to stop shooting."

Shirley — one of the most beloved performers in Hollywood is hitting the bottle "because of the pressure Marty's putting on her to sign over her home to him and to let him take her teenage son, Patrick Cassidy, into show business," the source told The ENQUIRER.

"Every day Ingels calls her on the set and they have screaming fights over the phone. The other day she was shouting, 'Leave Patrick alone. I want him to go to school and make something of himself — I don't want him to be a teenage idol!' "

Former staffers say Ingels, who brags about owning seven guns, has even gone so far as to threaten them with violence.

"When I argued with him he told me I'd never walk the face of the earth again," confided one frightened former employee. "He told me he was going to blow up my face. Once I even had to call my attorney because I thought he was going to come over and kill me. The guy is a crazy person."

(PHOTOGRAPH DELETED)

HITTING THE BOOZE: Shirley drinks because of the pressure that husband Marty Ingels — pictured with her here — puts on her, says an insider. "The man is a maniac," says one producer.

Said another: "He still owes me a lot of money. He promises he'll make it up to you — but he never does. Instead, he hires and fires so he won't have to pay."

Though Ingels is only a minor producer of commercials, he has one of the most notorious casting couches in all of Hollywood.

"I was furious to find that I was the victim of a classic casting couch routine," complained one young would-be actress.

"He told me I could have the part in a movie he said he was doing if I would go to bed with him — I told him to go jump in the lake."

Even established stars are beginning to feel as if they, too, have been dragged over the famous couch.

"Steve Allen, Gary Burghoff and Esther Rolle were all going to sue him over appearances in a TV program for the Lutheran Church," recalled one insider. "The church paid Ingels $60,000 — but he only passed on $30,000 to the stars."

Shocked and hurt by the obvious rip-off attempt, Allen wrote a personal letter to Ingels which read, in part: "Marty, I can't believe that anybody in the industry — and especially a contemporary — would try to nail three peers in a thing like this." The suit was eventually settled out of court.

Ingels' raging tantrums and foul mouth seem to know no bounds. For example, he once alienated the president of the Pillsbury Co. with a vulgar, four-letter blast over the phone, according to a former associate.

People who have worked closely with Ingels are throwing up their hands in despair.

"The man is sick and he's hurting my industry," fumed producer Lloyd Kolmer. "I try to reason with him but he rants and raves and then sends me threats. The man is a maniac!"

When asked by The ENQUIRER about the charges, Ingels replied: "Of course, none of it is true" — but he admitted that he was "flattered" by all the attention.

— JOHN SOUTH

Office-Supreme Court, U.S.
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No. 82-1401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IAIN CALDER and JOHN SOUTH,
Appellants,

v.

SHIRLEY JONES and MARTY INGELS,
Appellees.

On Appeal from the California Court of Appeal, Second Appellate District

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1401

IAIN CALDER and JOHN SOUTH,
Appellants,

v.

SHIRLEY JONES and MARTY INGELS,
Appellees.

On Appeal from the California Court of Appeal, Second Appellate District

---

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

---

1. Unable to deny the conflict in the circuits and States regarding the First Amendment's applicability to personal jurisdiction, Appellees' response in effect is that the conflict is not enormous, but merely big.

They reach that conclusion first of all by never even citing the 1982 decision of the Supreme Court of Georgia that held "First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity." *Bradlee Management Services, Inc.* v. *Cassells*, 249 Ga.

614, 617, 292 S.E.2d 717, 720 (1982), *quoting New York Times Co.* v. *Connor*, 365 F.2d 567, 572 (5th Cir. 1966). They argue that the D.C. Circuit's view does not count, even though there the district court held, relying on the Fifth Circuit line of cases, that "the fact that the Journal Company is a newspaper requires the weighing of different considerations," *Margoles* v. *Johns*, 333 F. Supp. 942, 946 (D.D.C. 1971); and the court of appeals, affirming, quoted and approved the district court's holding that "the same reasons which militated against the assertion of jurisdiction over foreign newspaper corporations whose local contacts arose solely out of the gathering of news also apply to limit our jurisdiction under the recently enacted long-arm statute" because it is "desirable in the public interest that many newspapers should maintain vigilant correspondents here." *Margoles* v. *Johns*, 483 F.2d 1212, 1222 (D.C. Cir. 1973). Appellees brush aside the Second Circuit's holding that "the First Amendment could be regarded as giving *forum non conveniens* special dimensions and constitutional stature in actions for defamation against publishers and broadcasters," and Judge Medina's concurring approval of "the First Amendment applied to the expanding subject of jurisdiction over the person." *Buckley* v. *New York Post Corp.*, 373 F.2d 175, 183-84 (2d Cir. 1967).

Appellees cannot deny the conflict with the Fifth Circuit, because the court below acknowledged it. But Appellees hint that the Fifth Circuit view has weakened. The cases demonstrate just the opposite. *Edwards* v. *Associated Press*, 512 F.2d 258 (5th Cir. 1975), held: "In conclusion, we reaffirm the First Amendment protections we have woven into our prior *in personam* jurisdictional analysis . . . ." 512 F.2d at 268. And last year in the Eleventh Circuit, the court of appeals flatly held that "in this Circuit, as in the former Fifth Circuit, federal jurisdiction is subject to First Amendment considerations when a nonresident publisher is sued for libel." *Cox Enterprises, Inc.* v. *Holt*, 678 F.2d 936, 937 (11th Cir. 1982).

Everyone except Appellees recognizes the First Amendment's role in jurisdiction to be an important unsettled issue of constitutional law and jurisdiction. Lower court judges are faced with it all the time, with no explicit guidance from this Court. For instance, Chief Judge Lord of the Eastern District of Pennsylvania noted last year, in rejecting the position of the court below, that "the Tenth Circuit purports to be in complete disagreement with the Fifth Circuit on this issue." *McCabe* v. *Kevin Jenkins and Associates, Inc.*, 531 F. Supp. 648, 655 (E.D. Pa. 1982).[1]

2. The "fiduciary shield" doctrine, which most courts apply but the court below rejected, holds that the acts of an out-of-state corporate employee on behalf of the corporation do not provide extraterritorial personal jurisdiction over the employee. The federal courts in California follow this rule. *Forsythe* v. *Overmyer*, 576 F.2d 779 (9th Cir.), *cert. denied*, 439 U.S. 864 (1978); *Chem Lab Products, Inc.* v. *Stepanek*, 554 F.2d 371 (9th Cir. 1977). Indeed, courts often hold that jurisdiction is barred even when the employee committed allegedly tortious acts in the forum state itself. See, *e.g.*, *Bulova Watch Co.* v. *K. Hattori & Co.*, 508 F. Supp. 1322, 1347 (E.D.N.Y. 1982).

Appellees try to minimize the fact that the court below, in listing the cases it rejected, specifically included the leading Ninth Circuit case, *Forsythe* v. *Overmyer*, *supra*. See Jurisdictional Statement at 10a. Appellees

---

[1] Appellees incorrectly state, Motion To Dismiss or Affirm, at 13 n.16, that *McCabe* "turns on the long arm statute of Pennsylvania." The court in that case held: "Because the Pennsylvania statute extends jurisdiction to the fullest extent permitted under the Constitution, however, the only inquiry required is whether assertion of jurisdiction over KJAI is consistent with the due process standards set forth in *International Shoe Co.* v. *Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and its progeny. I therefore proceed immediately to the constitutional question." 531 F. Supp. at 649-50 (footnote omitted).

also argue that other cases applying the fiduciary shield doctrine rested on construction of state jurisdictional statutes rather than on the due process clause. As was noted in the Jurisdictional Statement, at 14-15, that is so in some instances, *e.g.*, *Marine Midland Bank* v. *Miller*, 664 F.2d 899 (2d Cir. 1981). Many of the holdings, however, are squarely rested on the due process clause:

> "[S]everal courts have held that the doctrine is a constitutional principle, applied to determine whether the exercise of jurisdiction comports with fair play and substantial justice. [Citing cases.] . . . We find the latter view persuasive and will therefore apply the doctrine as a due process limitation on the exercise of jurisdiction." *State ex rel. Miller* v. *Internal Energy Management Corp.*, 324 N.W. 2d 707, 711 (Ia. 1982).

Accord, *e.g.*, *Hurletron Whittier Co.* v. *Barda*, 402 Ill. App. 3d 443, 448, 402 N.E. 2d 840, 843 (1980) ("the requirements of the due process clause"); *Weller* v. *Cromwell Oil Co.*, 504 F.2d 927, 929, 931 (6th Cir. 1974) ("It is settled that jurisdiction over the individual officers of a corporation cannot be predicated merely upon jurisdiction over the corporation"; "if the statute were construed to permit suit in Ohio we would still be faced with grave questions as to its constitutionality.").

3. Appellees argue that personal jurisdiction is achieved because the complaint (like most libel complaints) alleges intent. But extraterritorial personal jurisdiction depends on facts, not allegations of state of mind. Allegations of intent cannot substitute for the contacts required by *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). "Jurisdiction is lacking . . . unless there are sufficient contacts to satisfy the fairness standard of *International Shoe*." *Rusk* v. *Savchuk*, 444 U.S. 320, 328 (1980).

"Where a motion to quash or dismiss is filed, supported by affidavits, the non-moving party may not rest upon allegations or denials in his pleadings but his response by affidavit or otherwise must set forth specific

facts showing that the court has jurisdiction." *Weller* v. *Cromwell Oil Co.*, *supra*, 504 F.2d at 929-30. And " 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 295 (1980).

Here the trial court found as follows:

> "From the record in this case, it appears that neither South nor Calder maintained any residence or business office within California. Editor Calder did not enter California nor even make telephone calls into the state during his work on the Ingels article. Reporter South made a few telephone calls into California, including one in which he read the substance of the article to plaintiff Ingels shortly before its publication. In addition, it may fairly be inferred from the record before the Court that Reporter South visited California at least once for purposes relating to the article. The totality of such contacts, in this Court's view, are insubstantial." Jurisdictional Statement, at 16a.

That is the factual underpinning for the claim of extra-territorial personal jurisdiction here: no contacts at all with California by Editor Calder, and only four telephone calls, plus one court-inferred visit, by South.[2]

4. Appellees quote, Motion, at 21, from § 37 of the RESTATEMENT (2d), CONFLICT OF LAWS, but they stop quoting too soon. The section they partially quote goes on to say:

---

[2] Appellees, with no citation, say they believe South made more than three investigation-related telephone calls to California. Motion To Dismiss or Affirm, at 6 n.6. Three are all that are shown in the record, however. C.T. 139-40, 150-51. In addition, South telephoned Appellee Ingels once before publication to read him the story. Ingels' statements to South that "none of it is true" but nevertheless he was "flattered" were included in the story as published. See Appendix to Motion To Dismiss or Affirm, at 3. It is undisputed that all South's telephone calls were from Florida. Jurisdictional Statement, at 25a.

"Caveat:

"The Institute expresses no opinion whether in situations where the interests of the defendant are protected by the First and Fourteenth Amendments of the Constitution, it is necessary that a State have a more substantial basis for the exercise of judicial jurisdiction over a non-resident defendant than would otherwise be required.

* * * *

"*d. Comment on the Caveat:* An action for defamation is an example of an action which may affect interests of the defendant that are protected by the First and Fourteenth Amendments of the Constitution. For a State to have judicial jurisdiction over a non-resident defendant in actions of this sort, it may be that the defendant must have a closer relationship to the State, or have caused effects in the State of a more substantial nature, than would otherwise be required." *Id.* at 156, 159.

5. Surprisingly—but like the court below—Appellees completely ignore the applicable holdings of this Court. They do not even cite, much less try to reconcile the California court's decision with: *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*; *Rusk* v. *Savchuk*, *supra*; *Kulko* v. *Superior Court*, 436 U.S. 84 (1978);[3] *Shaffer* v. *Heitner*, 433 U.S. 186 (1977); or *Hanson* v. *Denckla*, 357 U.S. 235 (1958). Like the California court's opinion, Appellees' analysis is sketched on a clean slate, as if the precedents of this Court did not exist.

6. Appellees contest this Court's jurisdiction under 28 U.S.C. § 1257(2). Their argument is that because the California jurisdictional statute on its face conforms to constitutional limits, therefore "it is impossible for it to be either unconstitutional on its face or as applied." Motion To Dismiss or Affirm, at 2. Appellees' proposition is half correct. The California statute indeed is not

[3] Appellees do cite *Kulko* on another point. Motion To Dismiss or Affirm at 2.

unconstitutional on its face. The challenge here, however, was to the statute *as applied*,[4] and such a challenge, when rejected by the state court, is properly heard by this Court on appeal. See, *e.g.*, *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 440-41 (1979); *Cohen* v. *California*, 403 U.S. 15, 17-18 (1971); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 289 (1921). Under Appellees' theory, decisions upholding state statutes challenged as applied could never be heard on appeal if the statutes were drafted to be constitutional on their face. That notion was long ago rejected. *Dahnke-Walker Milling Co.* v. *Bondurant*, *supra*. This Court has jurisdiction under § 1257(2).

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[4] Appellees' reference in this context to *Kulko* v. *Superior Court*, 436 U.S. 84 (1977), is misplaced. In *Kulko* appeal was improper because the constitutionality of the state statute itself had not been challenged below. Here, however, the statute was challenged below on the ground that as applied to Appellants it was repugnant to the Constitution, and the state court decided in favor of the statute's validity. The court below applied the California statute to Appellants in the face of Appellants' arguments that "were it to be interpreted otherwise [than as excluding Appellants], § 410.10 would violate the Due Process Clause of the Fourteenth Amendment." *Cf. Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 440-41 (1979).

CONCLUSION

For the reasons stated here and in the Jurisdictional Statement, this Court should note probable jurisdiction.

Respectfully submitted,

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No. 82-1401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IAIN CALDER and JOHN SOUTH,
Appellants,

v.

SHIRLEY JONES and MARTY INGELS,
Appellees.

On Appeal from the California Court of Appeal, Second Appellate District

---

SUGGESTION OF MOOTNESS AS TO APPELLEE INGELS

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Appellees.

On Appeal from the California Court of Appeal, Second Appellate District

---

SUGGESTION OF MOOTNESS AS TO APPELLEE INGELS

Appellants wish to advise the Court that Mr. Marty Ingels, one of the Appellees in this case, has voluntarily dismissed all his claims against all the defendants, including Appellants. His Request for Dismissal was filed in the Superior Court of the State of California for the County of Los Angeles on April 4, 1983, and we are informed has been entered by that court and terminates this litigation as to him. See CAL. CODE OF CIV. PROC. §§ 581, 581d.

Appellants believe that this dismissal by Mr. Ingels renders the present appeal moot as to him. It does not in any way affect the position of Appellee Jones, however, and as to her this case and the issues it raises remain unchanged.

In accordance with the settled practice of this Court in cases that become moot, the appropriate disposition

of the appeal with respect to Mr. Ingels is to vacate the judgment of the court below as to him. *DeFunis* v. *Odegaard*, 416 U.S. 312, 320 (1974); *Garvin* v. *Cochran*, 371 U.S. 27 (1962); *cf. Tulare Lake Canal Co.* v. *United States*, 103 S.Ct. 712 (1983); *Chicago Board Options Exchange, Inc.* v. *Board of Trade*, 103 S.Ct. 434 (1982); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Costs should be taxed against Appellee. *Dyer* v. *City Council of Beloit*, 333 U.S. 825 (1948).

CONCLUSION

For the reasons stated, the judgment with respect to Appellee Ingels should be vacated as moot with costs taxed against Appellee.

Respectfully submitted,

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Honorable Alexander L. Stevas
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Supreme Court of the United States
Washington, D.C. 20543

Re: Calder, et al v. Jones, et al
No. 82-1401

Dear Mr. Stevas,

On Monday, May 16, 1983, this office, which represents Appellees Shirley Jones and Marty Ingels in the above captioned appeal received Appellants' "Suggestion of Mootness As To Appellee Ingels". We were given no advance notice that such a document would be filed. In a subsequent telephone conversation with Mr. Frank Larsen of your office, I was advised that Appellants' Suggestion of Mootness would be discussed at a Clerk's Conference on Thursday, May 19, 1983. This allows Appellees only two days to respond to a filing in this appeal which seeks significant relief from this court, to wit, the vacation of a lower court judgment and an award of costs against one Appellee. Accordingly, Appellees submit that the full 10 day response time under Rule 42.4 should have been allowed.

To apprise the Court of Appellees' position on this matter I am forwarding this letter to your office for consideration at the Thursday conference. The substance of the letter will be later printed and filed with the Court in accordance with the pertinent Court rules and the permission of Mr. Larsen of the Clerk's office pursuant to our conversation on Monday, May 16, 1983.

ARGUMENT

Appellees Shirley Jones and Marty Ingels confirm that Mr. Ingels has alone dismissed his claims in the trial court against all defendants in this action, including Appellants. However, that dismissal has no effect on this appeal and it does not follow that the judgment below of the California Court of Appeal and the California Supreme Court's denial of hearing can or should be vacated or otherwise affected as to Mr. Ingels or that any award of costs be made against him. This is so because the

underlying facts and the substantive issues of this appeal are unaffected by the dismissal.

Appellants concede in their suggestion that the dismissal of Mr. Ingels in no way affects the position of Appellee Jones or the issues of this appeal as framed by Appellants. Any taxable costs under Rule 50 will be incurred by Appellants regardless of the dismissal. In addition, since Appellants have not yet filed their Joint Appendix with the Court, and will not be doing so until June 17, 1983, they have not yet incurred costs. The case of Dyer v. City Council of Benoit, 333 U.S. 825 (1948), cited by Appellants is simply a per curiam decision announcing a costs award after dismissal of an appeal for mootness with no discussion of the relevant facts upon which the award was based.

As to the question of vacating the lower court's judgment, Appellants are wrong in stating that the case has become moot and wrong in stating that the practice of this Court requires the vacation of the judgment. The parties are in this forum on Appellants' instance and there is no contention of mootness as to them, as was so in DeFunis v. Odegaard 416 U.S. 312 (1974) (Appellant's case moot since at time of hearing he was about to complete his legal education) and Garvin v. Cochran 371 U.S. 27 (1962) (Habeas Corpus application rendered moot by death of applicant prisoner).

It is only when an entire case becomes moot that the dismissal of appeal and the vacating of a lower court judgment is appropriate. Crowell v. Mader 444 U.S. 505, 506 (1980). Where the case becomes moot as to only one appellee and others remain, it is not appropriate to dismiss the entire appeal and vacate a lower court judgment respecting other parties. Kremers v. Bartley 431 U.S. 119, 129 (1977).

In this case there is in fact no way to vacate the lower court judgment which would not prejudice the rights of Appellee Jones, since the jurisdictional facts of this dispute involve both Appellants and both Appellees. That judgment should stand in its entirety pending this Court's review regardless of whether or not Mr. Ingels remains a party to this appeal. See, Werner v. Southern California Associated Newspapers, 35 Cal 2d 121 (1950), appeal dismissed, 340 U.S. 910 (1950) (Dismissal of appeal prior to Supreme Court review on merits but after jurisdiction noted had no effect on lower court judgment.)

The appropriate resolution of this matter would be the dismissal of the appeal as to Appellee Ingels leaving the lower court judgment standing as to him, where he remains the prevailing party. Since that decision will stand, the appropriate resolution of the costs issue is that each party should bear their own as to Mr. Ingels' appeal.

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Appellants present neither logic nor authority to justify the vacating of the lower court judgment when the case remains fully viable and justiciable as between the two Appellants and Appellee Jones. Similarly, there is no basis for any costs award. Accordingly, this matter should proceed forthwith on the merits.

Respectfully submitted,

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No. 82-1401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IAIN CALDER and JOHN SOUTH
Appellants,

v.

SHIRLEY JONES and MARTY INGELS,
Appellees.

ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

Brief Amicus Curiae Of THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS In Support of Appellants' Jurisdictional Statement

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No. 82-1401

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

IAIN CALDER and JOHN SOUTH,
Appellants,

v.

SHIRLEY JONES and MARTY INGELS,
Appellees.

ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT

Motion of the

THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

For Leave To File A Brief Amicus Curiae In
Support of Appellants'
Jurisdictional Statement.

The Reporters Committee for Freedom of the Press hereby moves this Court for leave to file a brief as amicus curiae in support of the Statement As To Jurisdiction in this case. The consent of the Appellants has been obtained. [Appendix A] Appellees have objected to the timely filing under this Court's rules of this amicus brief on the basis of their belief that they will not have the opportunity to respond to the points raised. [Appendix B]

As an organization whose members are engaged in the gathering and dissemination of news reports concerning matters of public interest, movant believes that the ability of its members to serve the public will be greatly encumbered by the decision below.

Movant believes that its brief amicus curiae will aid this Court by (1) clarifying the far-reaching ramifications of the California Court of Appeal decision, (2) describing how this decision, if permitted to stand, will be detrimental to the First Amendment rights of the news media and the public, and (3) elucidating why the decision below is flatly inconsistent with

jurisdictional principles established by this Court over the past four decades and is in conflict with numerous other state and federal lower court rulings.

Accordingly, movant respectfully requests this Court to grant leave to file its accompanying Brief in Support of Appellants' Jurisdictional Statement.

Respectfully submitted,

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QUESTIONS PRESENTED

Whether it is permissible under the First and Fourteenth Amendments for a Distant State court in whose jurisdiction an allegedly libelous publication has circulated to assert personal jurisdiction in a libel case:

(a) over a non-resident reporter whose only contacts with the Distant State were several newsgathering telephone calls and possibly one trip; and,

(b) over a non-resident editor whose only contact with the Distant State was general supervision over newsgathering.

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Appellees.

ON APPEAL
FROM THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT

Brief Amicus Curiae Of

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

In Support of Appellants' Jurisdictional Statement

INTEREST OF AMICUS CURIAE

The Reporters Committee for Freedom of the Press is dedicated to defending through the press the First Amendment and the Freedom of Information interests of the public in knowing about the operation of government. The Reporters Committee is a voluntary, unincorporated association of working reporters and editors, which has provided representation, legal guidance and research in virtually every major press freedoms case that has been litigated since 1970.

In the area of libel, notably, this amicus has appeared before this Court in Herbert v. Lando, 441 U.S. 153 (1979). It has appeared in other recent cases involving challenges to the rights of reporters, including:

Nebraska Press Ass'n. v. Stuart, 427 U.S. 539 (1976);
Zurcher v. Stanford Daily, 436 U.S. 547 (1978);
Gannett Co. v. DePasquale, 443 U.S. 368 (1979);
Richmond Newspapers Inc. v. Virginia, 448 U.S. 555 (1980);

Chandler v. Florida, 449 U.S. 460 (1981);
Department of State v. Washington Post, 456 U.S. 595 (1982);
FBI v. Abramson, 456 U.S. 615 (1982); and
Globe Newspaper v. Superior Court, 102 S.Ct. 2613 (1982)

As working reporters, our interest in this case is in protecting the ability of journalists to gather news in distant states without fear that they will be forced to defend themselves in libel suits when they have no significant contacts with the jurisdictions in which the suits are brought.

STATEMENT OF THE FACTS

Amicus adopts the appellants' statement of the facts and summarizes them as follows:

Appellees Shirley Jones, a professional entertainer, and Marty Ingels, an entertainment agent and broker, both California residents, brought suit for libel and related claims arising from publication of an article in the October 9, 1979, issue of the National Enquirer circulated in California.

The story included reports that Ingels "has terrorized his staff" and that Jones "has been driven to drink by [Ingels'] bizarre behavior."

Named as defendants were National Enquirer, Inc., a Florida corporation; its local distributing company; Appellant Iain Calder, president and editor of the Enquirer; and Appellant John South, the reporter who wrote the article.

The Enquirer and its distributing company are not parties to this appeal. They have

not contested the court's assertion of jurisdiction over them.

Appellants Calder and South are both Florida residents. Neither maintains an office, residence or a bank account in California.

During the four years prior to publication of the article in question, Appellant Calder traveled to California once, on a brief pleasure trip. As editor, Calder reviewed page proofs of the October 9, 1979, edition. He did not directly supervise investigation or writing of South's article. Calder's supervisory services were rendered in his business office in Florida.

Over the same four year period, Appellant South went to California about twenty times to gather news for the Enquirer. There is a dispute between the Appellees and the Appellants as to whether one of these trips was in connection with the story at issue.

The Appellants maintain that Mr. South made three telephone calls to sources in California in an unsuccessful attempt to gather information for the story upon which Ingels and Jones sued. A fourth was placed

to Appellee Ingels. Mr. South read the article to Ingels over the phone before it was published so that Ingels might have the opportunity to respond to it. All of the calls were placed from Mr. South's Florida office.

Appellants appeared specially in California Superior Court for the County of Los Angeles to contest the state's exercise of "long arm" jurisdiction over them.

The statute, Cal. Civ. Proc. Code sec. 410.10, allows California courts to assert jurisdiction to the extent permitted by the United States Constitution.

The Superior Court quashed service of process on Appellants. It held, among other things, that the First Amendment interests in this case made it unfair and unreasonable under International Shoe Co. v. Washington, 326 U.S. 310 (1945), to assert jurisdiction. (See Appendix C of Appellant's Jurisdictional Statement).

The California Court of Appeal (2nd Dist.) reversed, ruling that a court cannot consider First Amendment interests in deciding whether to assert personal

jurisdiction over a non-resident editor or reporter. It held that a California court could assert personal jurisdiction over these non-residents under the statute because they had used their home base in Florida to commit the intentional tort of libel in California. (See Appendix A of Appellant's Jurisdictional Statement).

The Court of Appeal further held that Appellant South's one call from Florida to Respondent Ingels for a reaction to the story was, in itself, a sufficient "minimum contact" with the state to support the assertion of personal jurisdiction under International Shoe, supra.

Appellants petitioned the California Supreme Court, which denied hearing. They then filed a timely appeal with this Court.

ARGUMENT

I. INTRODUCTION.

This is a case of first impression raising the question of whether a distant state where a publication has circulated has unconstitutionally applied its "long-arm" jurisdiction statute to a non-resident reporter and editor. This Court has jurisdiction under 28 U.S.C. 1257(2) to decide this matter because it calls into question application of state law in a manner that abridges a right protected by the U.S. Constitution.

There is a significant split among the federal circuits and the courts of some states concerning the degree to which the First Amendment should be considered in determining whether an assertion of personal jurisdiction comports with the "fair play and substantial justice" test established by this Court. This case presents an opportunity for the Court to resolve this conflict.

If this Court permits the decision of the California Court of Appeal to stand, many non-resident reporters and editors will live under the perpetual threat of lawsuits filed against them in distant states based upon any

of their stories appearing in a publication that circulates in that distant state. They will have to live with the possibility that they could be forced to defend themselves at great expense far from where they live and work.

Amicus fully supports the jurisdictional statement of Appellants.*/

II. CALIFORNIA'S ASSERTION OF JURISDICTION OVER A NON-RESIDENT REPORTER AND A NON-RESIDENT EDITOR IN THIS LIBEL CASE VIOLATES DUE PROCESS PRINCIPLES ESTABLISHED BY THIS COURT.

Under the jurisdictional doctrines established by this Court California has no basis to assert jurisdiction over the Appellants.

In International Shoe Co. v. Washington, 326 U.S. 310 (1945), this Court held that due process principles forbid a state from

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*/ Attorneys for Amicus were assisted in preparation of this brief by law students Robert Dato of the University of San Diego School of Law, and Gini Nelson of the George Washington University National Law Center.

asserting personal jurisdiction over a non-resident unless the non-resident has certain "minimum contacts" with that state.

A rule of reasonableness has evolved for assessing a party's contacts with the forum. Under this rule, courts must consider whether a party has purposely availed itself of a state's protection, Hanson v. Denckla, 357 U.S. 235 (1958); continuously or systematically conducted business activities in the state, International Shoe, supra; or directly contracted with a state resident, McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

A synthesis of this Court's decisions leads to the conclusion that a substantial presence in the state is required. The National Enquirer, the publication involved in this libel case, has conceded that it is present in California and has submitted to that state's jurisdiction. It distributes more than 30 million copies in California a year. It solicits advertising and circulation in the state.

In contrast, the editor and reporter involved here never had the requisite minimum presence in the state of California.

Appellant-Reporter made sporadic visits to California to gatner news over a four-year period, yet none of these visits was related to the preparation of the story which Appellee's claim caused them injury. Appellant South's only contacts with California regarding this article were four telephone calls placed from Florida, one of them to Appellee Ingels seeking a response.

Appellant-Editor had no contacts with California in connection with the story.

Because neither Appellant had sufficient "minimum contacts" with California, that state's exercise of jurisdiction in this case violates tne due process guarantees of the 14th Amendment.

III. THIS COURT SHOULD RESOLVE A SIGNIFICANT DIVISION AMONG STATE AND FEDERAL COURTS BY REQUIRING THAT FIRST AMENDMENT INTERESTS BE CONSIDERED BEFORE PERSONAL JURISDICTION IS EXERCISED OVER NON-RESIDENT REPORTERS AND EDITORS.

By agreeing to review this case -- either by noting probable jurisdiction or by granting certiorari -- this Court can resolve a

considerable split of authority concerning the relevance of First Amendment interests in assessing whether a court's assertion of personal jurisdiction is fair and reasonable. Amicus believes that even if this Court finds that Appellants' activities amount to "minimum contacts," the Court of Appeal ruling should be overturned because First Amendment considerations make it unfair and unreasonable for a California court to assert jurisdiction in this case.

A state may not assert jurisdiction beyond that which is permitted by the United States Constitution. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). In International Shoe, supra, 326 U.S. at 316, this Court held that the maintenance of a suit over a non-resident defendant must "not offend 'traditional notions of fair play and substantial justice'" (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). It must be reasonable to require the non-resident to defend the suit, International Shoe, supra at 317. Reasonableness "will in an appropriate case be considered in light of other relevant factors . . . " World-Wide Volkswagen Corp., supra, at 292.

The First Amendment has been considered to be a significant factor in determining jurisdiction in a majority of the Circuits that have examined this question. These courts point to the chilling effect of exposing the news media to potential liability in a distant state where they have little or no contact. See, e.g., New York Times Co. v. Connor, 365 F.2d 567, 572-73 (5th Cir. 1966).

The minority believes First Amendment interests are better asserted once the court assumes jurisdiction. See, e.g., Anselmi v. Denver Post, Inc., 552 F.2d 316, 324 (10th Cir. 1977).[1/]

Amicus respectfully requests this Court to resolve the split in the circuits by requiring that the First Amendment interests be considered before a court asserts personal jurisdiction. The prior decisions of this Court clearly require consideration of First Amendment principles.

1/For a complete listing of the current split of authority on this issue see Appellants' Statement as to Jurisdiction at 12.

This Court has recognized that newsgathering is an activity protected by the First Amendment. In Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), in which this newsgathering right was held to outweigh the parties' interest in closing a criminal trial, Mr. Justice Stevens wrote, "arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment." Id. at 583. And in Branzburg v. Hayes, 408 U.S. 665, 681 (1972), this Court declared that "without some protection for seeking out the news, freedom of the press could be eviscerated."

This Court has repeatedly held that the First Amendment must be considered before the interests it protects are abridged. Richmond Newspapers, Inc. v. Virginia, supra. Consideration of these interests is required even if it is ultimately determined that they will not prevail in a given case. Zurcher v. Stanford Daily, 436 U.S. 547 (1978); Herbert v. Lando, 441 U.S. 153 (1979).

The California Court of Appeal's refusal to even consider these interests here,

therefore, runs counter to the rulings of this Court and a majority of jurisdictions that have addressed the issue.

If First Amendment interests are considered in this case, it is clear that the danger of exposing Appellants to potential liability far outweighs California's incidental interest in asserting jurisdiction over them.

California's concerns for providing a forum in which Appellees can litigate their claims can be served in this case without abridging Appellants' First Amendment rights. The National Enquirer has submitted to the jurisdiction of the state's courts. Therefore, this is not a case in which the plaintiff will be left without a defendant to satisfy any judgment that may be awarded.

On the other hand, damage to the First Amendment will be great if the Court of Appeal decision is allowed to stand, because it will subject thousands of reporters and editors to the possiblity of suit far from their homes.

Amicus believes that the most disturbing aspect of the California Court of Appeal's opinion is the holding that jurisdiction could be asserted over Appellant South merely

because he placed a single telephone call from Florida to Appellee Ingels in California. His purpose in making the call was to get Ingels' response to the article. Appellant South was attempting to write a balanced story from which readers could formulate their own opinions.

The telephone is an important tool used by reporters in gathering news. If the simple act of making a telephone call could subject them to great legal expense reporters would be hampered in their ability to cover stories of major public importance far from their offices.

Editors will hesitate to publish controversial stories if the mere fact that their publications circulate in a distant state will establish a basis for personal jurisdiction over them.

If California is free to exercise jurisdiction in this case, other states with equally broad "long arm" jurisdiction statutes will be encouraged to do the same. Consequently, the publication of any story by any nationally distributed newspaper or magazine could subject the reporter and editor to the jurisdiction of any state in which the publication was circulated. Distant states

could easily impose substantial legal expenses on reporters and editors, who would be forced to travel great distances to defend themselves. A libel plaintiff need only to show that the reporter made a single telephone call to a source in California to obtain information for the story or that the editor supervised some aspect of the development of the story..

If the California Court of Appeal decision is allowed to stand, the public -- the main beneficiary of the First Amendment -- will suffer because it will be deprived of the publication of truthful, balanced news. Few reporters or editors would be willing to risk the preparation of controversial articles about events in distant states. Likewise, reporters and editors will actually be discouraged from presenting fair and balanced stories if the price of such "balance" is submission to a distant state's jurisdiction and the resulting expense of defending the libel action.

A news organization may decide that it is more prudent not to circulate in a state which forces its employees to appear personally and to defend themselves at great expense. If, in response to repeated application of the Court

of Appeal decision, publishers withdraw from California, that state's residents will be deprived of substantial sources of information.

If this Court were to overturn the Court of Appeal decision, it would admittedly place some burden on libel plaintiffs who decide that they wish to sue the non-resident reporter or editor personally, in addition to the publishing corporation. However, this is a reasonable burden compared to the extreme burdens this exercise of long-arm jurisdiction would place on the First Amendment interests of the press, as well as the availability of information to the public.

Therefore, Amicus urges this Court to resolve the split among the federal and state courts by requiring that these significant First Amendment interests be considered by courts prior to exercising jurisdiction over non-resident reporters and editors.

CONCLUSION

Amicus contends that California's application of its "long-arm" jurisdiction statute unconstitutionally interferes with an activity protected by the First Amendment. There is a significant split among the federal circuit courts and some state courts concerning the weight to be given the First Amendment in deciding whether the assertion of jurisdiction is proper. This Court should require that the First Amendment be given considerable weight in deciding whether jurisdiction should be asserted over non-resident reporters or editors, in order to prevent serious harm to the newsgathering process as well as to the flow of information to the public.

For these reasons, Amicus requests that this Court note probable jurisdiction or, in

the alternative, grant Appellants' request for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

WILLIAMS & CONNOLLY
Hill Building
839 Seventeenth Street, N.W.
Washington, D.C. 20006

March 21, 1983

Ms. Judy D. Lynch
Reporters Committee
for Freedom of the Press
Suite 300
800 18th Street, N.W.
Washington, D.C. 20006

Re: Iain Calder and John South v. Shirley Jones and Marty Ingels

Dear Ms. Lynch:

On behalf of Appellants Iain Calder and John South, we consent to the filing of a brief of the Reporters Committee for Freedom of the Press as amicus curiae.

Yours truly,

s/F. Lane Heard III

APPENDIX B

HAYES & HUME
132 South Rodeo Drive
Beverly Hills, California 90212-2473

March 18, 1983

Reporters Committee for the
Freedom of the Press
Room 350
800 18th Street, N.W.
Washington, D.C. 20006

Attention: Jack Landau

Re: Iain Calder and John South v. Shirley Jones and Marty Ingels; United States Supreme Court No. 82-1401

Dear Mr. Landau:

This letter will confirm that Appellees Shirley Jones and Marty Ingels have been advised of the desire of the Reporters Committee for the Freedom of the Press to file a brief amicus curiae in support of the Statement of Jurisdiction filed by Appellants Iain Calder and John South in the Supreme Court on February 22, 1983.

Appellees would have had no objection to the filing of such a brief at an earlier time. However, they must now point out for the record that the request comes at a time when Appellees' Motion to Dismiss or Affirm directed to Appellants' Statement is at the

printers for final printing prior to filing. Under these circumstances, Appellees are unable to respond to any points which may be raised in the amicus brief which have not been addressed by Appellants, although the Committee has had since February 22, 1983, to consider the matter, and prepare and file such a brief. Accordingly, by this letter we formally object to the filing of the brief.

Very truly yours,

s/Richard P. Towne
Counsel for Appellants

Office - Supreme Court, U.S.
FILED
JUN 17 1983
ALEXANDER L. STEVAS,

No. 82-1401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IAIN CALDER and JOHN SOUTH,
Appellants,

v.

SHIRLEY JONES,
Appellee.

On Appeal from the California Court of Appeal, Second Appellate District

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BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

1. Do the First and Fourteenth Amendments and the Commerce Clause permit a California court to assert personal jurisdiction over a Florida editor and reporter solely on the ground that they worked in Florida, on an article published by their Florida employer, which allegedly libeled a California resident?

2. In determining whether the Fourteenth Amendment permits personal jurisdiction over an out-of-state reporter and editor in a libel case, is it improper to give weight to the First Amendment?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1401

IAIN CALDER and JOHN SOUTH,
Appellants,

v.

SHIRLEY JONES,
Appellee.

On Appeal from the California Court of Appeal, Second Appellate District

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BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the Court of Appeal (J.A. 107)[1] is reported officially at 138 Cal. App. 3d 128 and unofficially at 187 Cal. Rptr. 825. The order of the Supreme Court of California denying hearing (J.A. 122) is unreported. The opinion of the Superior Court of the State of California for the County of Los Angeles (J.A. 93) also is unreported.

JURISDICTION

The judgment of the California Court of Appeal was entered December 15, 1982. J.A. 107. The Supreme Court of California denied a timely petition for hearing on February 10, 1983. J.A. 122. Notice of appeal to this Court was filed on February 16, 1983, J.A. 123, and the appeal docketed February 22, 1983. On April 18, 1983,

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[1] Citations to "J.A." refer to the Joint Appendix filed herein.

this Court entered its order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits. J.A. 125. This Court has jurisdiction under 28 U.S.C. § 1257(2), as is further discussed at pp. 49-50, *infra*.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

California Code of Civil Procedure § 410.10 provides:

> "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

Pertinent constitutional provisions are reproduced in Appendix A.

STATEMENT

A. Facts.

Appellee is a professional entertainer, J.A. 9, public figure, J.A. 8-9, and resident of California. With her husband, Mr. Marty Ingels, she brought this action for libel and related torts against the National Enquirer, Inc., publisher of a national weekly newspaper, and also its local distributing company and the two Appellants, Iain Calder and John South. The claim was based on an article that appeared in the Enquirer's October 9, 1979 issue. The article stated that Appellee's husband "has terrorized his staff, cheated stars, outraged advertisers and scandalized Hollywood," and that Appellee "has been driven to drink by his bizarre behavior." J.A. 11.

The complaint alleged that the two plaintiffs were public figures.[2] It did not allege any damage to reputation, but did claim emotional distress. J.A. 9. The plaintiffs sought general damages of $10,000,000.00 and punitive

[2] "[W]ell known and well recognized by numerous and diverse citizens and people of the County of Los Angeles and, in fact, of the entire nation . . . ." J.A. 8-9. The complaint alleged that the article was published with reckless disregard of its truth and with intent to harm. J.A. 9.

damages of an additional $10,000,000.00. J.A. 10. After maintaining that the article was untrue, J.A. 14, 78, Appellee's husband filed a voluntary dismissal of his complaint on the morning of his deposition. Appellee has concontinued to pursue the litigation on her own behalf.[3] The complaint stated that both Appellants "in doing the acts herein alleged were acting within the course and scope of their employment." J.A. 8.

Appellant Calder is employed as editor and president of the Enquirer. Appellant South is employed by the Enquirer as a reporter, and his byline appeared on the article. Both Appellants are and were at all relevant times residents of Florida. J.A. 17, 19.[4]

Both appellants were served with process by mail in Florida in accordance with the California "long-arm" statute, under the jurisdictional provisions of Cal. Code of Civil Procedure § 410.10. They caused special appearances to be entered on their behalf and moved to quash service of process, challenging the constitutionality under the First and Fourteenth Amendments of the application of § 410.10 to them. J.A. 15-16, 80-85.[5]

The evidence before the trial court was entirely undisputed, and consisted wholly of affidavits and extracts of

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[3] On May 31, 1983, this Court entered an order dismissing the appeal as to Appellee's husband. Appellee has continued to demand damages of $20,000,000.00, the same amount she and her husband had sought collectively.

[4] The complaint alleged that Appellants "were acting by virtue of their own motives as individuals and also were the agents and employees of defendant National Enquirer, Inc." J.A. 8.

[5] The Enquirer, which is a Florida corporation with principal place of business in Florida, did not contest the California court's jurisdiction and answered the complaint. J.A. 93. The distributing company also answered and made no objection to the jurisdiction. In the Court of Appeal Appellants argued also, as they had pointed out in the trial court, J.A. 83, that jurisdiction over employees in such circumstances would unconstitutionally burden interstate commerce. J.A. 106.

deposition testimony. Without any contradiction it showed the following:

As to Appellant Calder: He edits the newspaper and exercises general supervision of its editorial activities. J.A. 24. He is the second ranking person in the organization J.A. 24, 75, and "oversee[s] just about every function of the Enquirer." J.A. 24. He has no other business activity. J.A. 17. He resides and has his office in Florida. J.A. 17, 75. He has never had an office or place of business in California nor conducted business there. J.A. 17. He has never owned property, obtained credit, or had bank accounts in California. *Ibid.* He had visited California only once during the three to four years preceding 1980, a purely pleasure trip. J.A. 30. Later he visited California once in 1981, after the publication of the article in question, for the purpose of attending and testifying as a witness in an unrelated trial.[6] With respect to the article in question, he had no participation in its investigation, research or writing except for routine editorial services. J.A. 17. He had no knowledge of the source of the story, had never read the reporter's copy of it, and had no dealings with the story except to review an initial evaluation of the subject and, he assumed,[7] routinely to see it in final page proof form. J.A. 27-28. After it was published he decided not to print a retraction, J.A. 29, because "we stand by the article and as far as I'm concerned the story is true," *ibid.* All his activities regarding the article took place at his office in Florida. J.A. 17. All were performed as part of his duties as an employee of his employer, and not in a personal capacity. *Ibid.*

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[6] Although Appellee's attorneys were present in the courtroom at that 1981 trial and say that they observed Appellant Calder's presence, J.A. 46, they made no attempt to serve him personally with process in California.

[7] "I would imagine I saw that. I don't specifically recollect seeing it, but I would have seen it." J.A. 28.

As to Appellant South: He is a reporter employed by the Enquirer. Like Calder, he is a Florida resident and his office is at the Enquirer newsroom in Florida. J.A. 19. He never has had an office in California, nor has he ever engaged in any business activity in California in his personal capacity, nor owned assets, obtained credit, nor maintained a bank account there. J.A. 19, 34. All of South's services in connection with the article, according to his uncontradicted affidavit, took place in Florida. J.A. 19.

South researched and wrote the first draft of the article, and his byline appears on it. J.A. 13. Normally after a draft is turned in, the final article is prepared by a rewrite editor. J.A. 60, 63. It was uncontradicted that South did not travel to California in connection with the article. J.A. 19, 90-91. The record shows that he made three long-distance telephone calls from Florida to California in connection with research for the article, two to an Enquirer stringer, Ms. Dayzhun Jane Chesis, one to a Ms. Betty Hager. J.A. 50, 56-57, 65, 69-70, 74. He may have made others.[8] The only other contact with California by Appellant South that related in any way to the article was an additional long-distance telephone call from Florida to Appellee's husband Mr. Ingels, to read him the draft article so that he might comment upon it. J.A. 71.[9] All of South's activities regarding the article were performed as part of his duties for his employer, and not in an individual capacity. J.A. 19.

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[8] The exact number does not appear in the materials submitted for the record by Appellee. Although it was not part of the record before the courts below, Mr. John Robert Lucas in a subsequent deposition testified that there was one additional investigative long-distance telephone call to him. See Appendix B; *cf.* J.A. 35-36.

[9] Mr. Ingels denied the truth of the article, and his denial was included in the final version as published. J.A. 13. According to the article, J.A. 13, and to Appellant South's description as recounted to a witness, Mr. Ingels in the conversation was "amused" and said he was "flattered" and to "print it." J.A. 71. According to Mr. Ingels, he became ill and upset. J.A. 78.

Regarding contacts with California unrelated to the article, Appellant South stated that in the course of his employment during a four-year period he had visited California more than twenty times in total. J.A. 32.[10] On two occasions prior to the article's publication he had met with Mr. John Robert Lucas, a sometime source in California. J.A. 34. Those visits concerned a number of articles, *ibid.*, but not the one about Appellee, J.A. 19. South also telephoned Mr. Lucas frequently. J.A. 35-36.

B. The Superior Court's Ruling.

Based on the evidence submitted, all of which was documentary, the trial court found:

> "From the record in this case, it appears that neither South nor Calder maintained any residence or business office within California. Editor Calder did not enter California nor even make telephone calls into the state during his work on the Ingels article. Reporter South made a few telephone calls into California, including one in which he read the substance of the article to plaintiff Ingels shortly before its publication. In addition, it may fairly be inferred from the record before the Court that Reporter South visited California at least once for purposes relating to the article. The totality of such contacts, in this Court's view, are insubstantial." J.A. 94.[11]

The trial court concluded that "as the U.S. Supreme Court has made abundantly clear in its *World-Wide Volkswagen* and *Kulko* opinions," J.A. 95-96, the motion to quash service should be granted. J.A. 98, 99. It observed that the conclusion might be different had this been a case "in which a defendant ships a dangerous and defective

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[10] Ms. Chesis estimated that South came to California more than six, but less than a dozen times per year. J.A. 66. All his trips were on his employer's business. J.A. 33, 66.

[11] Appellants emphasized to the trial court that there was no basis in the record to support an inference that South had visited California in connection with the article, and that his affidavit that he had not done so, J.A. 19, was uncontradicted. J.A. 90-91. See note 19, *infra*.

product into the state, which leads to an accident within the state." J.A. 94. But that, the court emphasized, was not this case:

> "The question presented by this case is whether further consideration is required because the case involves First Amendment freedom of expression and because the defendants sought to be brought into this jurisdiction are employees of the publisher. . . . [T]he cases seem to be in agreement that First Amendment considerations should be weighed in the balance of fundamental fairness in resolving whether a state can compel a nonresident defendant to appear and defend an action." J.A. 95-96.

The court observed that "if reporters and editors are required to appear in remote jurisdictions and defend against claims for punitive damages, it is foreseeable that such actions would have a chilling effect on reporters and editors." J.A. 97. The

> "principal practical effect of holding the individual defendants as parties to this lawsuit would be to facilitate plaintiffs' claims for punitive damages against the individuals. . . . Surely the right of a plaintiff to punish a defendant resident of a remote jurisdiction, and to receive damages beyond those necessary to compensate him for his injury should not weigh heavily on the constitutional scale of fundamental fairness." J.A. 96-97.

The court contrasted the jurisdictional position of employees with that of a company doing interstate business:

> "It may not be unfair to hold a publisher to account for compensatory and punitive damages in a remote jurisdiction if a sensational story he publishes is false. After all, it is the publisher who balances risk and reward in establishing the character of his publication, and it is the publisher who stands to make substantial profits if he publishes true stories of widespread interest.
>
> "It is quite another matter to hold magazine employees to the same accounting. A reporter or editor who suffers an award of punitive damages would

not be entitled to reimbursement from his employer, nor to indemnification based on any insurance policy the employee or the employer might have. Thus, punitive damages would come from the employee's own pocket. Few would be willing to risk writing or editing controversial articles for national publications if they could be required personally to appear in remote jurisdictions as individual defendants and possibly suffer judgments for punitive damages, and surely pay unlimited litigation expenses. Thus, prudent reporters and editors would have an incentive to avoid controversial stories vastly disproportional to the rewards they could expect for their diligence and industry in uncovering truthful but controversial stories, especially stories adverse to wealthy or powerful individuals. If such a state of affairs were to come to pass, the informed public would be the loser." J.A. 97.

C. The Court of Appeal's Reversal.

On appeal, the California Court of Appeal acknowledged that "clearly there can be no general jurisdiction in the present case as a result of defendants' contacts with California consisting of occasional trips to that state." J.A. 113. It noted that

> "Neither defendant has ever owned assets or bank accounts in California or engaged in business or been employed there. It may not be said that defendants' activities in California are extensive, wide-ranging, substantial, continuous or systematic." J.A. 112-13.

The trial court had erred, however, said the Court of Appeal, by giving any weight to First Amendment considerations in its jurisdictional analysis:

> "Plaintiffs contend that the trial court improperly applied a special First Amendment test in determining that the court may not assume jurisdiction over defendants Calder and South. We agree." J.A. 110.

The Court of Appeal held that "personal jurisdiction over them must be determined in accord with traditional prin-

ciples unaffected by First Amendment considerations." J.A. 111. The court said that only "minimal contacts," J.A. 112, with California need be shown.

On that basis the court looked first at Appellant Calder:

> "As the trial court observed, defendant Calder did not enter California or even make telephone calls into the state in connection with his role in the preparation of the subject article; all of his acts with reference to that article apparently were performed in Florida." J.A. 122-13.

Nevertheless, the court held, California's jurisdiction over the Florida editor (and over the reporter as well) was established simply because the complaint alleged an intentional tort with injury in California. As the Court of Appeal explained in its view of the law:

> "For the purpose of determining whether a California court may assume jurisdiction over Calder in this lawsuit, it must be presumed that Calder, in participating in the publication of the article as its editor, intended to cause injury to plaintiffs in California where they reside; such injury in fact occurred. Accordingly, a valid basis exists for California's exercise of personal jurisdiction over Calder with respect to the causes of action alleged herein." J.A. 114.

The court conceded that a California Supreme Court case [12] had rejected extraterritorial personal jurisdiction in a contract claim premised on an effect caused in California, when it had not been shown that the defendant "purposefully availed himself of the privilege of conducting business in California or of the benefits and protections of California law," or anticipated economic benefit from dealings in California, or that the transaction was subject to special regulation in California. J.A. 114-15. Nevertheless, the court below announced,

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[12] *Sibley* v. *Superior Court*, 16 Cal. 3d 442, 546 P.2d 322, *cert. denied sub nom. Carlsberg Mobile Home Properties, Ltd.*—'72 v. *Sibley*, 429 U.S. 826 (1976).

> "such conditions need not be met where jurisdiction is predicated on an act or omission committed outside the forum state with the intent to cause a tortious effect within the state." J.A. 115.

The court said that the same theory of effect in the state gave jurisdiction over Appellant South as well. J.A. 116. For South it also announced two additional alternative theories for jurisdiction over him: First, the Court of Appeal believed that it sufficed to show that from Florida he had made one long-distance telephone call to Mr. Ingels, allegedly causing Ingels distress, which "constituted the doing of a significant act in California." J.A. 116. As the other alternative theory, the court said that extraterritorial personal jurisdiction over South was established because "he gathered information appearing in the allegedly defamatory article in the course of at least one visit made by him to California and telephone calls which he made to the state." J.A. 115.[13]

The court acknowledged that all of Appellants' acts were taken solely on behalf of their corporate employer, but held that Appellants nevertheless could be subjected to jurisdiction personally based on the same acts. It noted that other courts, including the federal courts of California, had held the contrary.[14] J.A. 116-17.

Having concluded that an allegation of effect sufficed for contacts, the court said that the test for extraterritorial jurisdiction was simply to weigh on the one hand "inconvenience to the defendant," against on the other "the interest of the plaintiff in suing locally" and the "interest of a state in providing a forum for its residents." J.A. 117-18. It reversed the judgment. The Supreme Court of California denied review. J.A. 122.

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[13] Regarding the absence of record evidence to support the visit the court hypothesized, see note 11, *supra*.

[14] *Forsythe* v. *Overmyer*, 576 F.2d 779 (9th Cir.), *cert. denied*, 439 U.S. 864 (1978).

SUMMARY OF ARGUMENT

Whether considered with or without the First Amendment, the judgment of the court below is not consistent with the Due Process Clause as interpreted in many decisions of this Court.

In the first place, the contacts of these two individuals with California—nonexistent in the case of Calder, confined to a few long-distance telephone calls in the case of South [15]—were not sufficient to meet the standard of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). Neither Appellant as an individual "purposefully availed himself," see *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958), of a privileged granted by California, and indeed under the Due Process and Privileges and Immunities Clauses, and the First Amendment, news-gathering is not a privilege that California could take away. Moreover, where extraterritorial personal jurisdiction over an individual rather than a corporation is asserted, the level of contacts required by due process is even greater.

It is settled law, moreover, that a nonresident agent of a corporation does not become personally subject to extraterritorial jurisdiction for acts he does for a corporate principal. The broad theory most relied upon by the court below—that extraterritorial jurisdiction is constitutional whenever it is alleged that an act outside the state intentionally caused a tortious result within it—simply is not the law. "The "effect" theory of jurisdiction has been applied only by a few state courts, and only to companies that manufacture physically hazardous products and market them generally. When such hazards of physical danger are not present, even the same courts

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[15] Even if South had made one news-gathering visit to California in connection with the article, the jurisdictional analysis would be no different. See notes 11, *supra*, and 19, *infra*.

have refused to apply the theory. See, *e.g.*, *Green* v. *Advance Ross Electronics Corp.*, 86 Ill. 2d 431, 427 N.E.2d 1203 (1981).

The court below also erred in rebuking the trial court for considering the effect an assertion of extraterritorial jurisdiction over reporters would have on activity protected by the First Amendment. This Court has made clear for decades that the scale of due process weighs all significant factors and policies, and certainly does not exclude any policy as important as the one explicitly written in the First Amendment, and made applicable to the states through the very same Due Process Clause of the Fourteenth. Appellants' employer, the National Enquirer, Inc., did not contest California's jurisdiction over it. As a practical matter, all that libel plaintiffs ordinarily would gain from being able to reach out for nonresident reporters in other states is an opportunity for personal punitive damages; that is an insubstantial consideration when weighed against the damage to the public's information sources, including small publishing individuals and enterprises, that would flow from permitting extraterritorial jurisdiction of this kind.

Finally, even if there were no Due Process Clause; even if there were no First Amendment; the California long-arm statute as applied here still would clearly be constitutionally invalid under the long line of decisions in which this Court has applied the Commerce Clause to strike down state laws that unduly burden interstate commerce. California's assertion here of personal jurisdiction over corporate employees in other states threatens interstate businesses of every kind. And when applied in this instance to corporate employees of a publisher, it threatens not just the free trade in commerce, but the free trade in ideas as well.

ARGUMENT

I. CALIFORNIA'S ASSERTION OF EXTRATERRITORIAL JURISDICTION OVER THESE FLORIDA INDIVIDUALS VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. The Contacts of Appellants With California Were Too Slight To Satisfy the Test Applied for Foreign Corporations.

The due process standards governing a state's power to exercise extraterritorial personal jurisdiction over nonresidents are clear. They are stated in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). Those standards were not remotely met in this case.

At least since Chief Justice Stone's opinion for this Court in *International Shoe*, *supra*, this Court has adhered to the rule that due process forbids extraterritorial personal jurisdiction by a state court over a nonresident defendant unless the plaintiff establishes (1) that the defendant had at least a minimum level of contacts with the forum state,[16] and also (2) that to exercise jurisdiction is consistent with "traditional notions of fair play and substantial justice." 326 U.S. at 316. In *Hanson* v. *Denckla*, 357 U.S. 235 (1958), this Court explained that although *International Shoe* was less rigid than the strict territorial rule of *Pennoyer* v. *Neff*, 95 U.S. 714 (1878):

> "But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts . . . . However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so

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[16] As explained by this Court later in the same Term, the holding of *International Shoe* was simply that for a corporation "'mere solicitation' when it is regular, continuous and persistent, rather than merely casual, constitutes 'doing business,' contrary to formerly prevailing notions." *Nippert* v. *City of Richmond*, 327 U.S. 416, 422 (1946).

> unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." 357 U.S. at 251.

Hanson v. *Denckla* emphasized that the constitutional standard looks to the defendant's forum-related activities:

> "[I]t is essential in each case that there be some act by which the *defendant purposefully avails [him]self* of the privilege of conducting activities within the forum State." 357 U.S. at 253, as quoted in *Kulko* v. *Superior Court*, 436 U.S. 84, 93-94 (1978), and also in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 298 (1980) (emphasis supplied).

Moreover,

> "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state." *Ibid.*

Most recently, in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), this Court held that the limitations imposed by the Due Process Clause involve two distinct considerations: both (1) protection to defendants from being haled into distant courts; and (2) preserving the national union, and other states, from the effects of one state's seeking to regulate or punish conduct and persons beyond its jurisdictional limits:

> "The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." 444 U.S. at 291-92.

Both of those constitutionally protected interests are jeopardized by the ruling of the California Court of Appeal in this case.

1. *Calder's Lack of Contacts.*

The evidence is undisputed, and both courts below found, J.A. 94, 113, that Iain Calder, the editor and president of the Enquirer, had no contacts at all with California: "all of his acts with reference to that article apparently were performed in Florida." J.A. 113. He did not even make a long-distance telephone call. His only connection with the story complained of was the performance of routine editorial services, in the course of which he probably read the story in proofs. J.A. 17, 27-28.[17]

Such an absence of any association with California means that that state cannot assert extraterritorial jurisdiction over Appellant Calder, unless the acts of his corporate employer can be imputed personally to him. The record in no way supports such an alter-ego finding, however, which neither court below supposed,[18] and this Court last year noted that as a matter of agency law it is the agent's acts that are imputed to the principal—not the (publisher) principal's to the (employee) agent. *General Building Contractors Ass'n* v. *Pennsylvania*, 102 S.Ct. 3141, 3151 (1982).

Extraterritorial personal jurisdiction, this Court has held, must be based on contacts of the defendant with the forum state. *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*. To assert that jurisdiction can be obtained over him because in Florida he routinely read an article before it was published by his corporate employer would be to overrule *World-Wide Volkswagen Corp.* v. *Woodson*, not to mention *International Shoe*. The due process "clause does not contemplate that a state may make binding a

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[17] After publication he declined on behalf of the corporation to print a retraction because "as far as I'm concerned the story is true." J.A. 29.

[18] Mr. Calder was the second in command of the corporation. J.A. 24, 75. Nothing in the record discloses what if any stock ownership he held in its parent company.

judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe*, *supra*, 326 U.S. at 319; *Rush* v. *Savchuk*, 444 U.S. 320, 332-33 (1980); *Shaffer* v. *Heitner*, 433 U.S. 186, 216 (1977). Due process requires contacts with the forum state. Appellant Calder had none.

2. *South's Telephone Calls.*

Appellant South's contacts with California, insofar as they relate to the article in question, were scarcely greater than Appellant Calder's. South did not visit California even once in connection with that article,[19] and only four long-distance telephone calls by him into that state were established with any degree of certainty.[20]

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[19] The trial court with no record basis simply speculated that he had made one such visit. See note 11, *supra*. That speculation is entitled to no weight because it was not based on a personal judgment of credibility (all the evidence was documentary), it contradicts Appellant South's undisputed affidavit, J.A. 19, and it fails to reflect that the burden of proving facts to establish jurisdiction was Appellee's. *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Escude Cruz* v. *Ortho Pharmaceutical Corp.*, 619 F.2d 902, 907 (1st Cir. 1980) ("Since plaintiff failed to counter the affidavits, the jurisdictional facts stated therein are controlling."). See J.A. 90-91. Nevertheless, the Court of Appeal repeated the same speculation. J.A. 115. This Court, particularly in a case involving the First Amendment, is not bound by a conclusion of a lower court that has no basis in the record. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964).

The utter baselessness of that speculation is confirmed by the fact that two months after the trial court's decision, Mr. Lucas was deposed and testified that although on one occasion he had discussed the subject of the article with Mr. South during a long-distance telephone call, he had never discussed it with South when South was in California. See Appendix B.

[20] See p. 5, *supra*. There was in addition one long-distance telephone call from Florida to Mr. Lucas. See Appendix B. The trial court concluded that Appellant South "made a few telephone calls into California." J.A. 94.

The Court of Appeal held that these investigative long-distance telephone calls from a reporter in Florida "constituted the doing of a significant act in California" sufficient to support extraterritorial personal jurisdiction. J.A. 116. But that again is not the law. If it were, the contacts requirement of *International Shoe* and *World-Wide Volkswagen* would be practically meaningless. More than *25 billion* long-distance telephone calls are made in this country every year.[21] If each of them could be potentially the basis for jurisdiction over the caller by the receiving state, then California would be close to regulating primary conduct in Florida, and the limits on sovereignty implicit in due-process limitations on state jurisdiction, *World-Wide Volkswagen*, *supra*, 444 U.S. at 292, would vanish. For that reason the sensible rule applied up to now has been that long-distance telephone calls do not suffice to establish extraterritorial jurisdiction. Mindful of the contacts required by due process and the constitutional framework, courts have held that "use of the mails, telephone, or other international communications simply do not qualify as purposeful activity invoking the benefits and protection of the state." *Thos. P. Gonzalez Corp.* v. *Consejo Nacional de Produccion*, 614 F.2d 1247, 1254 (9th Cir. 1980). This is particularly so when as here the telephone calls were simply to obtain information, and were not forming a contractual relationship.[22]

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[21] AMERICAN TELEPHONE & TELEGRAPH CO., 1982 ANNUAL REPORT 27 (1983). The figure includes some intrastate toll calls, but does not include interstate calls on local exchanges, *e.g.*, from Washington, D.C. to Fairfax, Virginia.

[22] *Accord, Lakeside Bridge & Steel Co.* v. *Mountain State Construction Co.*, 597 F.2d 596, 604 (7th Cir. 1979), *cert. denied*, 445 U.S. 907 (1980) (rejecting assertion of jurisdiction even when telephone calls were part of contract); *Warren* v. *Dynamics Health Equip. Mfg. Co.*, 483 F. Supp. 788, 791 (M.D. Tenn. 1980); *Marshall Egg Transp. Co.* v. *Bender-Goodman Co.*, 275 Minn. 534, 148 N.W.2d 161 (1967).

3. *South's Visits on Other Business.*

South made no visits to California in connection with the article of which Appellee complained. J.A. 19, 90-91; see notes 11, 19, *supra*. And even if he had made a visit on his employer's behalf for the purpose of gathering information for the article, that single visit, as the trial court recognized, J.A. 94, would not be a substantial enough basis for assertion of jurisdiction.

The fact that Appellant South visited California for his employer on other occasions is jurisdictionally irrelevant, as both lower courts also held.[23] Neither gave any weight to South's visits that were unrelated to the article. *Cf.* J.A. 94, 115-16. Visits for other purposes would be relevant only to support a theory that South was personally present in California so pervasively that that state would have general jurisdiction over him for all purposes. But even the Court of Appeal acknowledged that "clearly there can be no general jurisdiction in the present case as a result of defendants' contacts with California consisting of occasional trips to that state." J.A. 113.[24] *Accord, Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U.S. 516 (1923); *International Shoe Co.* v. *Washington*, *supra*, 326 U.S. at 317.

4. *Neither Appellant Purposefully Availed Himself of a Privilege Granted by California.*

Even if South had often visited California to gather information about this story—and the record shows he never visited it at all for that purpose—the due process

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[23] *Cf. Shaffer* v. *Heitner*, *supra*, 433 U.S. at 209: jurisdiction is not established when "the property which now serves as the basis for state-court jurisdiction is completely unrelated to the plaintiff's cause of action."

[24] Appellee also argued, as an afterthought, that extraterritorial jurisdiction might be asserted over South because—outside California—he executed an affidavit to be filed in another California proceeding. J.A. 86-89. The trial court described that argument as "nonsense," J.A. 91, and the Court of Appeal never bothered to refer to it.

requirements for jurisdiction still would not have been met. An information-gathering visit is totally different from a sales visit. Nor would an information-gathering visit be tortious, as was the automobile accident of the out-of-state driver in *Hess* v. *Pawloski*, 274 U.S. 352 (1927). Information-gathering visits of reporters should not be treated as jurisdictionally significant. See, *e.g.*, *Layne* v. *Tribune Co.*, 71 F.2d 223 (App. D.C.), *cert. denied*, 293 U.S. 572 (1934) (statute); *Margoles* v. *Johns*, 483 F.2d 1212 (D.C. Cir. 1973).

Moreover, it cannot be said that a reporter coming to gather information "purposefully avails himself of the privilege of conducting activities within the forum State." *Hanson* v. *Denckla*, *supra*, 357 U.S. at 253; *Kulko* v. *Superior Court*, *supra*, 436 U.S. 93-94; *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, 444 U.S. at 297. The opportunity of individuals generally to travel freely from state to state is not a state-granted privilege, but rather a national right. *Edwards* v. *California*, 314 U.S. 160 (1941); *Ward* v. *Maryland*, 12 Wall. 418, 430 (1871); *Crandall* v. *Nevada*, 6 Wall. 35 (1868); U.S. CONST., Art. IV, § 2. Further, when the individual is a reporter gathering news, he is exercising a freedom protected under federal law by the First and Fourteenth Amendments that a state may not hinder or impede. Such a news-gathering visit, or telephone call, unlike the corporation's decision to do or transact business in the state or the motorist's to use the state's highways, is not the "purposeful availing" of a state-conferred privilege that can support jurisdiction over a nonresident. *Cf. Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 82 (1938) (rejecting as due process violation an attempt by California to tax out-of-state transactions where it could not withhold the privilege of doing business) (Stone, J.).

The record does not show that either Appellant profited directly from their employer's editorial and marketing decisions with respect to California. As the trial court noted, the risks and the rewards, and the option to pull

back, all were the corporation's. J.A. 97. As this Court observed in analogous circumstances,

> "State Farm's decision to do business in Minnesota was completely adventitious as far as Rush was concerned. He had no control over that decision . . . . In short, it cannot be said that the *defendant* engaged in any purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, or reasonable . . . ." *Rush* v. *Savchuk*, 444 U.S. 320, 328-29 (1980) (emphasis in original).[26]

5. *Convenience Is Not the Test.*

For an individual to try to defend a multi-million-dollar suit in a state court thousands of miles away from his home and place of business is not an easy prospect. But even if the foreign state were as near as Maryland or Virginia is to this Court, the threshold requirement for necessary contacts with the forum would not disappear. As this Court explained in *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*,

> "Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum state is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment. *Hanson* v. *Denckla*, *supra*, at 251, 254." 444 U.S. at 294.

It certainly is not constitutionally sufficient to assume, as the court below did, that due process is satisfied if an effect is alleged on a plaintiff who is a resident of the forum. The court below stressed that "this state and its residents and taxpayers have a substantial interest in providing a forum where a resident may seek whatever

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[26] *Cf.* Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Volkswagen Corp.* v. *Woodson and Rush* v. *Savchuk*, 58 N.C.L. REV. 407, 427 (1980).

redress is due him." J.A. 118.[26] But what due process requires is at least minimum significant contacts with the forum *by the defendant. International Shoe, supra.* This Court has made that requirement unequivocally clear, rejecting decisions in which

> "The State's interests in providing a forum for its residents . . . are substituted for its contacts with the defendant and the cause of action. This subtle shift in focus from the defendant to the plaintiff . . . .
>
> "Such an approach is forbidden by *International Shoe* and its progeny." *Rush* v. *Savchuk, supra,* 444 U.S. at 332.

See also, *e.g., Green* v. *Advance Ross Electronics Corp.,* 86 Ill. 2d 431, 439, 427 N.E.2d 1203, 1207-08 (1981). The defendant's contacts are essential; they cannot be satisfied by those of the plaintiff. Indeed, if a plaintiffs' contacts could suffice, there would have been no need for this Court's opinion in *International Shoe Co.* v. *Washington, supra,* because there the plaintiff was the state itself, whose contacts with itself, one supposes, could not have been greater.

What is at stake in this case is not only inconvenience, anxiety and expense for individuals forced to defend in a distant state for acts done at home. More, it is the attempt by California to reach far beyond its borders and regulate and punish primary conduct of individuals in other states.

It is tempting to a state to try to extend its reach in such a manner. "[U]nder the relentless prod of local interest, the state's long arm will inevitably reach farther and farther."[27] The very California statute whose application is challenged here was drafted as broadly as the English language allows, not with any specific set of state concerns in mind, but simply to sweep into the

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[26] Quoting *Hall* v. *University of Nevada,* 8 Cal. 3d 522, 525-26, 503 P.2d 1363, 1365 (1972).

[27] Louis, *supra* n. 25, at 432.

state's jurisdiction all the future activity and persons outside its borders that the California could possibly claim to control. And as applied by the California courts, this long-arm statute has been extended, as in the present case, whenever California was satisfied that California was a convenient forum. See Ottonello, *California's Convenience-Oriented Approach to Personal Jurisdiction: A Critical Review*, 13 LINCOLN L. REV. 21, 31, 35 (1982) ("The California Supreme Court did not follow the straight forward rule of *Hanson*." "The California Supreme Court has proceeded on weak constitutional grounds in allowing convenience factors to compensate for an insufficient or nonexistent showing of minimum contacts."); *cf. Cornelison* v. *Chaney*, 13 Cal. 3d 143, 545 P.2d 264 (1976) (*held*, jurisdiction under § 410.10 over nonresident Nebraska trucker for accident in Nevada that injured a California resident); *Kulko* v. *Superior Court*, 19 Cal. 3d 514, 564 P.2d 353 (1977), *reversed*, 436 U.S. 84 (1978).

When states do reach beyond their borders to regulate primary conduct, the problems created are more than theoretical. A reporter in Florida under the decision below, and his employer, could not be sure of which state would try him, nor of which state's law would be applied. State courts, once they have jurisdiction, under current relaxed choice-of-law doctrine tend to apply their own law. See, *e.g.*, *Babcock* v. *Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279 (1963); *Mellk* v. *Sarahson*, 49 N.J. 226, 229 A.2d 625 (1967); *Foster* v. *Leggett*, 484 S.W.2d 827 (Ky. 1972) (state applied "better law"—its own—to accident in another state). Due process, to the extent it limits extraterritorial jurisdiction, "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimal assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, 444 U.S. at 297. The less predictable the forum, the less predictable the standard gov-

erning primary conduct.[28] This Court has held that in choice-of-law questions, the Constitution does not mandate a single answer. *Allstate Insurance Co.* v. *Hague*, 449 U.S. 302 (1981). A forum state may even adopt one part of another state's law, but not the rest. *Nevada* v. *Hall*, 440 U.S. 410 (1979). The absence of constitutional standards as to choice of law is one reason why extraterritorial jurisdiction must be watchfully policed, to protect federalism and the interests of other states and their citizens. See *Shaffer* v. *Heitner*, *supra*, 433 U.S. at 197; Silberman, *Commentaries on Shaffer* v. *Heitner*, 53 N.Y.U. L. REV. 33, 88 n.286 (1978).[29]

B. The Contacts of Appellants With California Were Too Slight To Satisfy the Higher Standard That Must Be Met for Extraterritorial Jurisdiction Over Individuals.

Even if Appellants were a publishing enterprise, therefore, the level and quality of contacts required by *International Shoe Co.* v. *Washington*, *supra*, were not met. But they are not a publishing enterprise; they are individuals. And the level of contacts required when the defendant is an individual is different, and must take into account the differences between an individual and a business entity.[30] "[T]here are relatively few circumstances

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[28] As Mr. Justice Jackson observed, "I doubt that the position can long be maintained that the reach of a state's power is a byproduct of an interest. The ultimate answer, it seems to me, will have to be based on considerations of state relations to each other and to the federal system." Jackson, *Full Faith and Credit: The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 28 (1945).

[29] "When the approach that allows a state to apply its own law in marginal cases is augmented by expanded bases of personal jurisdiction . . . the combination raises the specter of massive invasions by one state into the policies of another, rigidly enforced by the rules of full faith and credit to judgments." Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 230 (1976) (footnote omitted).

[30] Corporations have been treated differently from natural persons with respect to various constitutional provisions. See, *e.g.*,

under which one should be summoned to trial outside of his home district or state." Jackson, *Full Faith and Credit: The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1, 22 (1945).

International Shoe focused not on individual defendants, as to whom territorial tests of jurisdiction were relatively easy to apply, but rather on foreign corporations, as to which the test of jurisdiction had to involve more assumptions and judgment. The question answered there was the same one put by Judge Learned Hand in the case that broke the ground for *International Shoe*: "what dealings make it just to subject *a foreign corporation* to local suit." *Hutchinson* v. *Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (2d Cir. 1930) (emphasis supplied); *cf. International Shoe, supra*, 326 U.S. at 317. This Court shortly afterwards referred to "our recent decision in *International Shoe* v. *Washington*, 326 U.S. 310, which was concerned with the jurisdiction of a state over a foreign corporation." *United States* v. *Scophony Corp.*, 333 U.S. 795, 804 n.13 (1948). *International Shoe* was written broadly enough that its principles can apply both to corporations and to individuals. However, as this Court recently recognized,

> "The differences between individuals and corporations may, of course, lead to the conclusion that a given set of circumstances establishes state jurisdiction over one type of defendant but not over the

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Hale v. *Henkel*, 201 U.S. 43 (1906); *United States* v. *White*, 322 U.S. 694 (1944) (Fifth Amendment privilege against self-incrimination); *People* v. *Consolidated Edison Co.*, 42 Misc. 2d 422, 248 N.Y.S.2d 267 (1964) (criminal jurisdiction). See Note, 92 HARV. L. REV. 1227, 1230 (1979). The unique nature of corporations, this Court has noted, has led to unique jurisdictional rules for them. *United States* v. *Scophony Corp.*, 333 U.S. 795, 802-03 (1948); *cf. Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 636 (1819).

other." *Shaffer* v. *Heitner*, 433 U.S. 186, 204 n.19 (1977).[31]

The commentators traditionally distinguish between standards for jurisdiction over corporations and over individuals. *Compare* RESTATEMENT (2D), CONFLICT OF LAWS, *Chapter* 3, Topic 1, Title B, *with id.*, Title C; *compare* R. FIELD & B. KAPLAN, CIVIL PROCEDURE, Section 1 ("Natural Persons") *with id.*, Section 2 ("Corporations"), at 625, 650 (temp. 2d ed. 1968).

The first leading case in which this Court focused on state long-arm jurisdiction asserted over individuals not in busines for themselves was *Hess* v. *Pawloski*, 274 U.S. 352 (1927). In upholding jurisdiction, it did so for practical and policy reasons, because of the dangerous nature of automobiles, the seriousness of physical injuries they can cause, and the widespread difficulty of remedy if drivers fled the state. See *Olberding* v. *Illinois C.R.R.*, 346 U.S. 338, 341 (1953). In other contexts, when attempts have been made to assert extraterritorial jurisdiction over nonresident individuals not personally engaged in business for themselves, or not personally committing tortious acts within the state, this Court has rejected them. *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416 (1947); *May* v. *Anderson*, 345 U.S. 528 (1953).

C. An Employee Cannot Be Subjected to Extraterritorial Jurisdiction for Acts Performed Solely for the Employer.

As a corollary of the recognized differences between natural persons and corporations in measuring jurisdictional contacts, it is well established that jurisdiction over a foreign corporation does not carry with it juris-

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[31] In *Flexner* v. *Farson*, 248 U.S. 289, 293 (1919), this Court through Mr. Justice Holmes distinguished individuals from corporations on the ground that a state might exclude the latter but not the former. Later a nonresident individual engaging in a local business specially regulated by the state and with an agent in the state was treated for jurisdictional purposes like a corporation. *Henry L. Doherty & Co.* v. *Goodman*, 294 U.S. 623 (1935).

diction over the corporation's employees for their actions on its behalf. In the present case the complaint alleged that both Appellants "in doing the acts herein alleged were acting within the course and scope of their employment," J.A. 8, and their unchallenged affidavits confirmed that each performed whatever acts he did respecing the article solely in the course of his employment and "not acting in a personal capacity." J.A. 17, 19.

Contacts with a state that count under *International Shoe*, this Court has held, are personal to the actor and must be voluntarily undertaken on *his own* behalf, for "it is essential . . . [that] the defendant purposefully avails *itself*" (or himself) of the benefits and protections of the forum state. *Hanson* v. *Denckla*, *supra*, 357 U.S. at 253 (emphasis supplied). As explained by one court in a leading case:

> "The situation here is much like activity by a corporate employer who, by performing corporate business, causes the corporation to purposefully avail itself of the law of another state. Absent a ruse to conceal an employee's personal activity behind the corporate shield, it is most difficult to conclude that the employee purposefully availed himself of a distant forum's laws." *Idaho Potato Comm'n* v. *Washington Potato Comm'n*, 410 F. Supp. 171, 181 (D. Ida. 1976).

As *Hanson* v. *Denckla* held, each defendant's contacts with the forum must be measured individually; they cannot simply be lumped to achieve jurisdiction over all. This Court accordingly long has held that the fact that a subsidiary does business in a state does not confer jurisdiction over the parent, even if the subsidiary is wholly-owned. *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U.S. 333 (1925).

This is consistent with the fairness that is a part of due process. As the trial court pointed out, "it is the publisher who balances risk and reward in establishing the character of his publication, and it is the publisher

who stands to make substantial profiits if he publishes true stories of widespread interest." J.A. 97. Reporters and editors have no direct personal economic stake in their employer's sales in a distant state—nor is the ordinary employee able to control his employer's marketing activities. Due process considers whether, and by whom, a decision to market in a distant state was taken. *Cf. World-Wide Volkswagen Corp.* v. *Woodson*, *supra*.

A vast number of cases therefore have held, either as a matter of due process or as a construction of state long-arm statutes, that even if a nonresident corporate officer or employee of a foreign corporation enters the forum state in connection with the controversy at bar, his acts there which give rise to extraterritorial jurisdiction over the corporation do not also create extraterritorial jurisdiction over the individual. The Ninth Circuit, in a case specifically rejected by the court below, explained that

> "a corporate officer who has contact with a forum only with regard to the performance of his official duties is not subject to personal jurisdiction in that forum." *Forsythe* v. *Overmyer*, 576 F.2d 779 (9th Cir.), *cert. denied*, 439 U.S. 864 (1978).

Such an exercise of jurisdiction over a nonresident "would violate 'federal due process.'" *Chem Lab Products, Inc.* v. *Stepanek*, 554 F.2d 371, 372 (9th Cir. 1977). The court below also specifically rejected the holding of the court through Chief Judge Weinstein in *Bulova Watch Co.* v. *K. Hattori & Co.*, 508 F. Supp. 1322, 1347 (E.D. N.Y. 1981), that

> "under the 'fiduciary shield' doctrine, the acts of a corporate officer or employee taken in his corporate capacity within the jurisdiction generally do not form the predicate for jurisdiction over him in his individual capacity."

The cases and policy were thoroughly analyzed last year by the Supreme Court of Iowa in *State ex rel. Miller* v. *Internal Energy Management Corp.*, 324 N.W.2d 707 (Ia. 1982). See also 3A W. FLETCHER, CYCLOPEDIA OF THE

LAW OF PRIVATE CORPORATIONS § 1296.1 (Rev. perm. ed. 1975); 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1069 (Supp. 1980). "If such suits against officers of national corporations were ever permitted, the individuals could be sued in every state of the union whenever they make telephone calls or write letters to a customer . . . ." *Weller* v. *Cromwell Oil Co.*, 504 F.2d 927, 931 (6th Cir. 1974). Such has never been the law.

In the present case, the Court of Appeal's rejection of settled due process doctrine[32] is even more extreme, because here the two Appellants, who acted only in their corporate capacity, did not even enter California at all in connection with this dispute. The claim that jurisdiction over a nonresident publishing company carries jurisdiction over its nonresident reporters has been rejected. *Margoles* v. *Johns*, 483 F.2d 1212 (D.C. Cir. 1973);

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[32] For examples of decisions resting on due process, see, *e.g.*, *Weller* v. *Cromwell Oil Co.*, 504 F.2d 927 (6th Cir. 1974); *Wilshire Oil Co.* v. *Riffe*, 409 F.2d 1277, 1282-83 (10th Cir. 1969) ("unless the agents transact business on their own account and not on behalf of the corporation; the agents are not engaged in business so as to sustain an application of the long-arm statute to them as individuals"); *Idaho Potato Comm'n* v. *Washington Potato Comm'n*, 410 F. Supp. 171 (D. Ida. 1975); *State ex rel. Miller* v. *Internal Energy Management Corp., supra; Hurletron Whittier, Inc.* v. *Barda*, 82 Ill. App. 3d 443, 402 N.E.2d 840 (1980). For decisions reaching the same result construing state long-arm statutes, *see, e.g., Marine Midland Bank* v. *Miller*, 664 F.2d 899 (2d Cir. 1981); *Escude Cruz* v. *Ortho Pharmaceutical Corp.*, 619 F.2d 902 (1st Cir. 1980); *Lehigh Valley Industries, Inc.* v. *Birenbaum*, 389 F. Supp. 798, 803-804, *aff'd*, 527 F.2d 87 (2d Cir. 1975) ("It is axiomatic that jurisdiction over an individual cannot be predicated upon jurisdiction over a corporation. That is to say, an individual's transaction of business within the state solely as an officer of a corporation does not create personal jurisdiction over that individual."); *Willner* v. *Thompson*, 285 F. Supp. 394, 397 (E.D.N.Y. 1968) ("Since the corporate defendant is not the agent of the individual defendant, its acts cannot possibly be attributed to him.").

Bradlee Management Services, Inc. v. *Cassells*, 249 Ga. 614, 292 S.E.2d 717 (1982).[33]

D. Alleging a Non-Physical Effect in the Forum State Is Not Sufficient for Extraterritorial Jurisdiction.

In the years since *International Shoe*, many states (like California) have rewritten their long-arm statutes to sweep in whatever the Constitution will bear, and a few courts have extended extraterritorial jurisdiction to hold that if a dangerous manufactured object causes injury in the forum state, nothing more for jurisdiction is required. The two leading cases are *Buckeye Boiler Co.* v. *Superior Court*, 71 Cal. 2d 893, 458 P.2d 57 (1969) (pressure tank explosion); and *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 2d 761 (1961) (water heater explosion). Both *Gray* and *Buckeye Boiler*, it is generally recognized, pushed due process to the very limits, and if correctly decided are explainable in part by the nature of the injury and by unique circumstances present there.[34] This Court did not

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[33] The only case cited as authority by the court below was an anomalous district court decision, not involving defamation claims, which specifically acknowledged that "as a rule the courts have declined to exercise personal jurisdiction over individuals for their acts done in a personal capacity." *Donner* v. *Tams-Witmark Music Library, Inc.*, 480 F. Supp. 1229, 1233 (E.D. Pa. 1979).

[34] *Buckeye Boiler*, besides emphasizing the seriousness of the harm and the need for strict liability to discourage careless manufacture of dangerous products, also relied on the fact that the California plaintiff was suing both the Ohio boiler manufacturer and a California physician who had (allegedly negligently) treated him for his injuries. Each defendant claimed the other was at fault. To decline jurisdiction over the Ohio corporation, said the court, might lead to inconsistent verdicts and the possibility that the plaintiff would not recover at all. See 71 Cal. 2d at 906, 458 P.2d at 67.

In *Gray*, the court held that jurisdiction "depends on the particular facts in each case," noting that in the case before it "a cause of action arises from alleged defects in his product," 22 Ill.2d at 444, 442, 176 N.E.2d at 767, 766; the court assumed that "the trend in defining due process of law is away from the emphasis on

have occasion to review them, and their "effects" rationale is called into question by this Court's later ruling in *Kulko* v. *Superior Court*, *supra*, 436 U.S. at 98-99.

Only one product-liability case testing due-process jurisdictional protections has been decided by this Court: *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*. In it, this Court limited the *Gray* line of cases to circumstances in which "*a corporation* . . . delivers *its* products" for marketing in the forum state. *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, 444 U.S. at 298 (emphasis supplied). In other words, jurisdiction is to be asserted if at all only over the company marketing the dangerous and defective products, because that company has the power to "act to alleviate the risk" by if necessary "severing its connection with the State." *Id.* at 297. There is no suggestion that jurisdiction over a manufacturing company whose boiler blew up could also carry with it jurisdiction over a welder who worked on it.[35] Moreover, this Court emphasized that convenience is not the test and also that " 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *Id.* at 295. The commentators and cases alike recognize that effects in the forum are not alone a sufficient basis for jurisdiction when those effects "are not of a sort highly dangerous to persons or things." RESTATEMENT (2D), CONFLICT OF LAWS, § 37 comment a; *Lakeside Bridge & Steel Co.* v. *Mountain State Construction Co.*, *supra*, 597 F.2d at 602. Moreover, the Supreme Court of Illinois, citing *World-Wide Volkswagen*, has em-

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territorial limitations and toward emphasis on providing adequate notice and opportunity to be heard;" it saw no due process problem if suit was brought "in the court where both parties can most conveniently settle their dispute." 22 Ill. 2d at 441, 443, 176 N.E.2d at 765, 766.

[35] Nor is it appropriate, where First Amendment activity is concerned, to view as acceptable a publisher's "if the risks are too great, severing its connection with the State." 444 U.S. at 297. If publishing is restricted and localized, then, as the trial court recognized, "the informed public would be the loser." J.A. 97-98.

phatically refused to apply its own effect rationale in *Gray* to a tort that did not involve a dangerous product. *Green* v. *Advance Ross Electronics Corp.*, 86 Ill. 2d 431, 427 N.E.2d 1203 (1981).

The court below assumed that the most extreme product-liability cases governed a libel claim, and that jurisdictional requirements were satisfied by the bare allegations of the complaint that harm in the forum state had been intended and had occurred:

> "[I]t must be presumed that Calder, in participating in the publication of the article as its editor, intended to cause injury to plaintiffs in California where they reside; such injury in fact occurred. Accordingly, a valid basis exists for California's exercise of personal jurisdiction over Calder with respect to the causes of action alleged herein." J.A. 114.

That is, however, a total *non sequitur*. It ignores the burden upon the plaintiffs to establish adequate jurisdictional facts[36]—to show sufficient contacts of Calder and South with the forum state as required by *International Shoe Co.* v. *Washington, supra*. Instead of contacts, the court below was satisfied with jurisdiction by allegation—allege an intentional injury in the state, and nothing more is required. That has never been the law.

It is certainly not the law when a libel case is brought against out-of-state employees of an out-of-state publisher. This Court often has noted the particularized case-by-case analysis that is required by *International Shoe*. See, *e.g.*, *Shaffer* v. *Heitner*, 433 U.S. 186, 202-04 (1977). A defamation action complaining of humiliation and injured feelings—not even damage to reputation—is not a boiler-explosion case involving mangled limbs. The injury, if any, is more difficult to identify and quantify, is more easily feigned, and the "product" does not hold

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[36] *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). "Facts, not mere allegations, must be the touchstone." *Chem Lab Products, Inc.* v. *Stepanek*, 554 F.2d 371, 372 (9th Cir. 1977).

danger to the public at large. "Due process considerations would undoubtedly be more restrictive if there were involved simply a dispute of commercial dimensions between parties to a commercial contract [than where] one introduces into a state a dangerous instrument." *Singer* v. *Walker*, 21 App. Div. 2d 285, 292, 250 N.Y.S.2d 216, 223 (1964).[37]

For many years now, courts and legislatures have treated product-liability litigation, involving manufactured products endangering the public generally, as subject to exceptional substantive rules. Many jurisdictions have adopted a standard of strict liability without fault, even though such is not the ordinary tort standard. It is not surprising therefore that some state courts, as in *Gray* and *Buckeye Boiler*, have adopted for dangerous products a sort of strict-liability rule as to jurisdiction as well.[38] But what is before this Court is not a dangerous-product case; and strict liability can never be applied in the field of libel. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

A newspaper may publish a story that causes anger or distress, but a newspaper is not an inherently dangerous object. Even if it is so characterized metaphorically, any danger to one person's reputation would not, like a defec-

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[37] Dissenting in *World-Wide Volkswagen, supra*, Mr. Justice Blackmun explained that he reached the result he did because "for me, a critical factor . . . is the nature of the instrumentality under consideration." "My position need not take me beyond the automobile and the professional who does business by way of distributing and retailing automobiles. Cases concerning other instrumentalities will be dealt with as they arise and in their own contexts." 444 U.S. at 318, 319.

[38] Just as jurisdictional rules were stretched to meet the physical danger from nonresident motorists, to reach "a nonresident doing acts within the state, involving danger to life or property." Scott, *Jurisdiction Over Non-Resident Motorists*, 39 HARV. L. REV. 563, 586 (1926). *Cf. Hess* v. *Pawloski*, *supra*, 274 U.S. at 356 ("Motor vehicles are dangerous machines . . . their use is attended by serious dangers to persons and property.").

tive manufactured item, threaten the public at large. A due process analysis must take account of these differences, and not stretch jurisdiction so far when there is no physical injury to be compensated. Appellee alleged no physical injury at all, nor even any damage to reputation. See J.A. 8-9.[39] What may be reasonable in some circumstances in product-liability cases is not appropriate when "there is no claim that appellant has visited *physical injury* on either property or person within the State of California." *Kulko* v. *Superior Court*, *supra*, 436 U.S. at 96-97 (emphasis supplied). *Cf. Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 500-01 (1971) (health hazard to public generally).

II. THE COURT OF APPEAL ERRED IN REFUSING TO GIVE WEIGHT TO THE FIRST AMENDMENT.

As demonstrated in the previous section, the Court of Appeal failed to apply "traditional principles" required by *International Shoe*, and instead assumed jurisdiction in spite of the absence of sufficient contacts with California by either defendant to meet traditional jurisdictional standards. This section deals with the Court of Appeal's further error of rejecting the First Amendment as a necesary component in analyzing assertion of extra-territorial jurisdiction over a publisher's employees.

A. Constitutional Policies Cannot Be Ignored in Jurisdictional Analysis.

It is a commonplace that in determining whether jurisdiction is fair and reasonable under *International Shoe*, *supra*, courts must consider all the circumstances bearing on a particular case, including the substantive policies

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[39] Her husband, Mr. Ingels, had alleged that he vomited on learning of the article. J.A. 78. Even if this could have been thought of as a jurisdictionally significant event, however, it was contradicted by evidence from others that he instead had laughed, J.A. 13, 71, and the trial court made no finding that his alleged stomach upset ever had occurred. Mr. Ingels no longer is a party to the case.

that are a part of the law. This has long been done in, for example, many cases that held that in order to avoid overburdening interstate commerce, restraint on extraterritorial jurisdiction was called for. *See, e.g., Davis* v. *Farmers Co-operative Equity Co.*, 262 U.S. 312 (1923). Moreover, to say that the "interest" of the several states concerned will be examined is often simply another way of saying that policy will be weighed. *Cf. Texas* v. *New Jersey*, 379 U.S. 674, 679 (1965).

This Court has looked also even to non-constitutional substantive policies in limiting state-court extraterritorial jurisdiction. Thus in *Kulko* v. *Superior Court*, 436 U.S. 84 (1978), this Court refused to permit jurisdiction over a nonresident father who let his daughter visit her California mother, because to do so "would impose an unreasonable burden on family relations," 436 U.S. at 98, and because "to find personal jurisdiction in a State on this basis, merely because the mother was residing there, would discourage parents from entering into reasonable visitation agreements." *Id.* at 93. See also *May* v. *Anderson*, 345 U.S. 528, 533 (1953). "[T]he requisite minimum quantum of 'contact' between the defendant and the forum does and should vary with the measure of the values affected and the costs inflicted by the attempted exercise of power." Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227, 230 (1967).[40]

This Court in other cases as well has looked to non-constitutional policies in weighing jurisdiction. In *Hess* v. *Pawloski*, 274 U.S. 352 (1927), this Court referred to a fictional consent to jurisdiction from the use of a state's highways, but it also emphasized that "motor vehicles are

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[40] *Cf. Wright* v. *Yackley*, 459 F.2d 287 (9th Cir. 1972), holding that jurisdiction should not be asserted over nonresident physicians lest they be deterred from rendering medical assistance to residents. See generally Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1589 n.12 (1978); Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970).

dangerous machines." 274 U.S. at 356. As this Court later explained, the judgment that jurisdiction should attach was a practical one, one of policy based on the dangers from and mobility of interstate drivers. *Olberding* v. *Illinois C.R.R.*, 346 U.S. 338, 341 (1953) In *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957), this Court permitted jurisdiction where it otherwise might not have, because of the state's especially strong interest in regulating insurance transactions of its residents, an interest reflected in special regulatory and jurisdictional legislation. See *Hanson v. Denckla*, *supra*, 357 U.S. at 252; *cf.* also *Henry L. Doherty & Co.* v. *Goodman*, 294 U.S. 623, 627 (1935) ("Iowa treats the business of dealing in corporate securities as exceptional and subjects it to special regulation.").

The First Amendment's policy of encouraging the flow of information and a healthy press throughout the country is a constitutional imperative to which a court cannot shut its eyes. "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas . . . ." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969); see also *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945). Yet the court below, reversing the trial court, *explicitly* decided the case as if the First Amendment did not exist. When as here a publisher's employees are sued for their work on their employer's newspaper, such a pretense—that a part of the Constitution is missing—cannot be allowed.

The First Amendment, in fact, has been more potent than most substantive constitutional provisions in influencing procedure. In *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931), this Court through Chief Justice Hughes held that the normal rules of equity do not apply when prior restraints on the press are involved. In *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), ordinary criminal procedure was held an insufficient safeguard for the testing of First Amendment rights. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964), held that state-

court findings of fact are subject to an independent appellate review of the record in libel cases. See also, *e.g.*, *Speiser* v. *Randall*, 357 U.S. 513 (1958); *Carroll* v. *President and Commissioners*, 393 U.S. 175 (1968); *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936). If the First Amendment means anything, it means that a state by whatever means, including jurisdictional statutes, cannot reach out to interfere unduly with the national market in information and ideas.

Moreover, to rely on the First and Fourteenth Amendments, in the interest of the federal system, to limit the extraterritorial reach of a state's power to regulate or punish the conduct of nonresidents is far less of an intrusion than to alter the state's substantive law itself. Yet there is no doubt that the First Amendment also has altered as necessary the substantive laws of the states, as for example by requiring that negligence not be an acceptable standard for liability when public figures are sued for libel. *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Curtis Pub. Co.* v. *Butts*, 388 U.S. 130, 155 (1967). State civil and criminal statutes are tested more strictly for vagueness when First Amendment rights may be affected. See, *e.g.*, *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966). State courts' regulation of their bars, which normally is not questioned, will be invalidated if it too narrowly restricts First Amendment rights. *United Mine Workers* v. *Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of R.R. Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964). Two months ago in *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 103 S. Ct. 1365 (1983), this Court held that a tax statute that otherwise might meet constitutional standards nevertheless failed when put to the added test of the First Amendment's protection of the press.[41] State statutes that establish jurisdiction of the

[41] "[I]t may well be that certain rules impervious to attack when applied to ordinary human conduct may have to be altered or abandoned when used to regulate speech." *Rosenbloom* v. *Metro-*

state's courts over nonresidents are not immune from similar First Amendment testing.

To imagine that an assertion of extraterritorial jurisdiction over publisher's employees can be evaluated without regard to the effect on the First Amendment's guarantees of "freedom of speech, or of the press" is to deny the Amendment's influence on procedural decisions for at least half a century. An analysis of contacts and interests—*not excluding First Amendment interests*—is exactly what the "contacts" requirement of *International Shoe* mandates. Indeed, the very same Fourteenth Amendment that tests the assertion of extraterritorial jurisdiction under *International Shoe Co.* v. *Washington* also makes the First Amendment applicable to the actions of California through its legislature and courts. *Gitlow* v. *New York*, 268 U.S. 652, 666 (1925). Preserving First Amendment freedoms is an "indispensable" part of the "concept of ordered liberty"[42] that the Fourteenth Amendment mandates—yet dispense with it is exactly what the court below did.

B. California's Assertion of Extraterritorial Jurisdiction Over a Florida Editor and Florida Reporter Unconstitutionally Burdens Activity Protected by the First Amendment.

This Court has warned, in speaking of libel actions, of the "risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and the press." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). For that reason, the majority of state and federal courts that have considered the issue have unhesitatingly applied the First Amendment's speech and

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media, Inc., 403 U.S. 29, 65 (1971) (Harlan, J., dissenting on other grounds).

[42] See *Wolf* v. *Colorado*, 338 U.S. 25, 27 (1949); *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). *Palko* noted that freedom of expression is an "indispensable condition, of nearly every other form of freedom." 302 U.S. at 327.

press protections as part of their analysis of extraterritorial jurisdiction. An early case to discuss the point at length was *New York Times Co.* v. *Connor*, 365 F.2d 567 (5th Cir. 1966), and many others have approved and followed it.[43] Their reasoning was succinctly summarized last year by Chief Judge Lord of the Eastern District of Pennsylvania, who concluded that

> "if courts freely found *in personam* jurisdiction over publishers of first amendment articles under the same standards imposed on commercial entities, the citizens of each state would soon find themselves with access only to those publications with instate revenues sufficiently high to justify the cost of litigation within that particular jurisdiction." *McCabe* v. *Kevin Jenkins & Associates, Inc.*, 531 F. Supp. 648, 655 (E.D. Pa. 1982).

Therefore "federal jurisdiction is subject to First Amendment considerations when a nonresident publisher is sued for libel." *Cox Enterprises, Inc.* v. *Holt*, 678 F.2d 936, 937, *rehearing on other grounds*, 691 F.2d 989 (11th Cir. 1982). Those decisions were as recent as last year. More than fifteen years ago, Judge Medina commented that "I am not shocked to see the principles embedded in the First Amendment applied to the expanding subject of jurisdiction over the person." *Buckley* v. *New York Post Corp.*, 373 F.2d 175, 184 (2d Cir. 1967) (concurring opinion).[44]

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[43] "[W]hen a court attempts to assess whether jurisdiction over a defendant is reasonable, First Amendment considerations are a significant factor to be weighed." *Edwards* v. *Associated Press*, 512 F.2d 258, 266 (5th Cir. 1975). See also, *e.g.*, *Wolfson* v. *Houston Post Co.*, 441 F.2d 735 (5th Cir. 1971); *Walker* v. *Savell*, 335 F.2d 536 (5th Cir. 1964); *Margoles* v. *Johns*, 333 F. Supp. 942 (D.D.C. 1971), *aff'd*, 483 F.2d 1212 (D.C. Cir. 1973); *Gonzales* v. *Atlanta Constitution*, 4 Media L. Rptr. 2146 (N.D. Ill. 1979).

[44] Judge Friendly for the court in that case said he preferred to think of the rule as that "the First Amendment could be regarded as giving *forum non conveniens* special dimensions and constitutional stature in actions for defamation against publishers and broadcasters." 373 F.2d at 183-84. But jurisdiction must be estab-

Leading commentators on jurisdiction have approved the reasoning of this line of cases as necessary for the protection of First Amendment activity. Carrington & Martin, *supra*, 66 MICH. L. REV. at 240-43; Weinstein, *Trends in Civil Practice*, 62 COLUM. L. REV. 1431, 1436 (1962); Leflar, *Conflict of Laws*, 36 N.Y.U. L. REV. 36, 42 (1961); see also RESTATEMENT (2D), CONFLICT OF LAWS § 37 at 159 (1971).

The same reasoning has been applied *a fortiori* to reject extraterritorial jurisdiction over a publishing company's employees. Thus in *Bradlee Management Services, Inc.* v. *Cassells*, 249 Ga. 614, 292 S.E.2d 717 (1982), the Supreme Court of Georgia applying a First Amendment test held that although a broadcasting company's contacts with the forum state were sufficient to permit jurisdiction over it, that was not so for an announcer who worked in a distant city and had not entered the forum state. Jurisdiction over an individual journalist also was rejected, in consideration of First Amendment policy, in *Margoles* v. *Johns*, 333 F. Supp. 942 (D.D.C. 1971), *aff'd*, 483 F.2d 1212 (D.C. Cir. 1973). The same differentiation was made, and the same holding, in *Gonzales* v.

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lished before *forum non conveniens* can be considered. *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 504 (1947).

The result of a state court's dismissal for lack of jurisdiction under *International Shoe* or for *forum non conveniens* would be similar. But the practical difference between the two would be substantial. The burden on the defendant in the latter approach would be much greater because of the need to appear and then to try to persuade the foreign court that as a forum it was not suitable. State courts tend to see themselves as convenient. *Cf. Texas* v. *New Jersey*, 379 U.S. 674, 679 (1965). The rules would be far less certain or predictable, also. Standards for applying *forum non conveniens* are extremely subjective, variable, and inconsistent, are difficult to review, and "that amorphous doctrine differs from jurisdiction to jurisdiction." See Kurland, *The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 596 (1958); Anderson, *Libel and Press Self-Censorship*, 53 TEXAS L. REV. 422, 434, 437 (1975).

Atlanta Constitution, 4 Media L. Reptr. 2146 (N.D. Ill. (1979).[45]

First Amendment considerations in jurisdiction are particularly applicable where, as here, the plaintiff is admittedly a public figure—indeed, a celebrity. See J.A. 8-9. Moreover, she did not even claim that her reputation was damaged. J.A. 9. "[P]ublic figures are less vulnerable to injury from defamatory statements because of their ability to resort to effective 'self-help.'" Also, "public figures, like public officials, have 'voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.'" *Wolston* v. *Reader's Digest Ass'n*, 443 U.S. 157, 164 (1979), *quoting in part Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). Reporters and editors, employees of publishers, should not have to travel and perhaps retain counsel 3000 miles away to defend against a complaint that, because it is filed by a

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[45] The few cases that, like the decision below, held that the First Amendment should be ignored in the jurisdictional analysis, also ignored the rule of *International Shoe* that jurisdiction must be based on, first, contacts, and also, fairness. *Anselmi* v. *Denver Post, Inc.*, 552 F.2d 316 (10th Cir.), *cert. denied sub nom. Times Mirror Co.* v. *Anselmi*, 432 U.S. 911 (1977), interpreted *International Shoe* and *McGee* v. *International Life Ins. Co.*, *supra*, as holding that "due process can be satisfied even though the contact with the state is limited to one business transaction." 552 F.2d at 324. From there it went on to decide that the First Amendment policy applied in other cases was subject to the "countervailing policy consideration" of "the extremely disadvantageous position that citizens of Wyoming would be placed in" if they could not sue locally. *Ibid.* The court also assumed, quite erroneously, that the Fifth Circuit no longer gave weight to the First Amendment in jurisdictional matters. *Ibid. Contra, e.g., Edwards* v. *Associated Press, supra; Cox Enterprises, Inc.* v. *Holt, supra.*

Church of Scientology v. *Adams*, 584 F.2d 893 (9th Cir. 1978), erroneously concluded that "[i]n a defamation case . . . the appropriate jurisdictional analysis should be to determine whether or not it was foreseeable that a risk of injury by defamation would arise in the forum state." 584 F.2d at 897-98. *Contra, World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, 444 U.S. at 295.

public figure and does not even allege damage to reputation, may not even be constitutionally sufficient.[46]

It does not require lengthy exposition to demonstrate the burden on an individual in Florida who must defend a suit for $20,000,000 unliquidated compensatory and punitive damages in a state court in California. Judge Learned Hand once commented that "After now some dozen years of experience I must say that as a litigant I should dread a law suit beyond almost anything else short of sickness and death." *Address*, 3 ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, LECTURES ON LEGAL TOPICS 105 (1926). And worse than being a defendant in a local court is being a defendant in a court nearly three thousand miles away. *Cf. Hutchinson* v. *Proxmire*, 443 U.S. 111, 123 (1979).

Whether the reporter's employer is a co-defendant does not remove the burden.[47] To the extent the employer (as here) chooses to defend the assertion of extraterritorial jurisdiction over its employees, the burden on the press is increased. To the extent it does not—as could happen if the publisher and the reporter had inconsistent defenses—the cost of defending litigation for the reporter could be ruinous, and the pressure for reporters to trim their sails to avoid lawsuits all the greater. If the reporters could purchase insurance (and California like

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[46] See *Hutchinson* v. *Proxmire*, 443 U.S. 111, 134 (1979), identifying "protection to the reputation of an individual" as the constitutionally significant purpose of libel law. *Time, Inc.* v. *Firestone*, 424 U.S. 448, 460 (1976), assumed that injury to reputation there had occurred even though compensation for it was not sought; in the present case, however, damage to reputation is negated in the complaint. J.A. 9. "The interest at stake in all defamation is concededly the reputation of the person assailed." *Grant* v. *Reader's Digest Ass'n*, 151 F.2d 733, 734 (2d Cir. 1945), *cert. denied*, 326 U.S. 797 (1946) (L. Hand, J.).

[47] "[T]he connection of one counterdefendant with Illinois cannot be attributed to another simply because they have a common interest." *Green* v. *Advance Ross Electronics Corp.*, *supra*, 86 Ill.2d at 440, 427 N.E.2d at 1208.

many states does not permit insurance against punitive damages),[48] that cost would be an added burden on the press; and to the extent reporters had to insure against possible suits in every distant state, the risk would be large and unpredictable. If they themselves paid, all that it would take would be one major lawsuit in a distant forum to wipe out most journalists financially; that could occur whether ultimately they won or lost.

As Judge Sobeloff writing for the court noted in *Erlanger Mills, Inc.* v. *Cohoes Fibre Mills, Inc.*, 239 F.2d 502 (4th Cir. 1956),

> "We cannot shut our eyes to the disorder and unfairness likely to follow from sustaining jurisdiction in a case like this. It might require corporations from coast to coast having the most indirect, casual and tenuous connection with a State to answer frivolous law suits in its courts. To permit this could seriously impair the guarantees which due process seeks to secure." 239 F.2d at 507.

The burden of frivolous suits is illustrated, indeed, by this very case. For more than three years the plaintiff Marty Ingels pursued his lawsuit against Appellants as well as their employer the National Enquirer. He accused them in a verified complaint of publishing an article about him that was "false, untrue, libelous and defamatory," J.A. 9, 14, and declared under penalty of perjury that "it was all untrue" and a "pack of lies." J.A. 78. Then, without explanation, he voluntarily dismissed his complaint.[49] The expense to other defend-

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[48] See *City Products Corp.* v. *Globe Indemnity Co.*, 88 Cal. App. 3d 31, 151 Cal. Rptr. 494 (1979).

[49] "[K]nowing that the court will automatically assume jurisdiction over a distant defendant, plaintiffs may file nuisance suits in the hope of obtaining settlement offers which will be increased by the defendant's expense of litigating in a foreign state. If plaintiffs do not have the burden of establishing minimum contacts such nuisance suits will only be encouraged." Ottonello, *supra* p. 22, at 28 (footnotes omitted).

ants of investigating and defending against those now-abandoned charges has been substantial.[50] As one study observed:

> "The determination [of extraterritorial personal jurisdiction] is a crucial one. The maintenance of suit in an improper forum may subject the defendant to unwarranted financial hardship because of the high costs of transportation, to hostile triers of fact with an unavowed prejudice in favor of the local plaintiff or with a propensity for awarding large sums in damages, and often to the application of substantive rules of law less favorable to the defendant than those which might be applied in another court." Note, *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 911 (1960); *cf. Michigan C.R.R.* v. *Mix*, 278 U.S. 492, 495 (1929).

Those considerations are particularly germane to libel litigation, in which "the cost of litigating a libel action, burdensome on even the largest news organizations, often can cripple smaller news operations." *Steaks Unlimited, Inc.* v. *Deaner*, 623 F.2d 264, 280 n.76 (3d Cir. 1980).[51]

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[50] "A defendant facing a lawsuit brought in bad faith or on little factual or legal basis has a difficult choice: to settle and perhaps encourage similar lawsuits, or to engage in expensive litigation. The farther away the forum of the lawsuit, the more vulnerable is the local manufacturer to what might be called 'legalized backmail.'" Kamp, *Beyond Minimum Contacts: The Supreme Court's New Jurisdictional Theory*, 15 GA. L. REV. 19, 50 (1980).

"It must be remembered that lawsuits can be brought on frivolous demands or groundless claims as well as on legitimate ones, and that procedural rules must be designed and appraised in the light of what is fair and just to both sides in the dispute. Interpretations of basic rights which consider only those of a claimant are not consonant with the fundamental requisites of due process." *Gray* v. *American Radiator & Standard Sanitary Corp.*, *supra*, 22 Ill. 2d at 441, 176 N.E.2d at 766.

[51] The court went on:

"Five years ago, the minimum cost of defending a "full-fledged libel suit' was estimated at $20,000.00. Anderson, *Libel and*

The threat of litigation expense magnified in distant forums for the individual editor or reporter is no less an inhibition than others this Court has invalidated because they inevitably lead to suppression of speech "by inducing excessive caution in the speaker." See *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973).

C. The Objective of Punishing Speech Is Not Sufficient To Support Extraterritorial Jurisdiction Over a Publisher's Employees.

The trial court observed that as a practical matter, Appellee could obtain from the publishing company any compensatory damages to which she was entitled. "[I]t appears that the principal practical effect of holding the individual defendants as parties to this lawsuit would be to facilitate plaintiffs' claims for punitive damages against the individuals." J.A. 96-97. The trial court went on to note that

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Press Self-Censorship, 53 Texas L. Rev. 422, 435-36 (1975). The successful defense of *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971) was nearly $100,000.00. *Id.* In *Spouse* v. *Clay Communication, Inc.*, 211 S.E.2d 674, 690-91 (W.Va.), *cert. denied*, 423 U.S. 882, 96 S.Ct. 145, 46 L.Ed.2d 107 (1975), the West Virginia Supreme Court of Appeals expressed concern that in its state, 'where a large portion of the State is served by newspapers which lack substantial financial assets, the threat of potential libel actions becomes repressive, not only because of possible judgments but also because of the inordinate legal expenses normally incurred in defending a protracted libel suit.' *See also Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 610 n.40, 96 S.Ct. 2791, 2827, 49 L.Ed.2d 683 (1976) (Brennan, J., concurring in the judgment); Oakes, *Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma*, 7 Hofstra L. Rev. 655, 713 (1979); Note, *In Defense of Truth in Defamation Law*, 88 Yale L.J. 1735, 1742-43 & n.39 (1979)." *Ibid.*

See also *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board*, 542 F.2d 1076, 1083 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977).

> "Surely the right of a plaintiff to punish a defendant resident of a remote jurisdiction, and to receive damages beyond those necessary to compensate him for his injury should not weigh heavily on the constitutional scale of fundamental fairness." J.A. 97.

That observation is surely correct, and indeed should be dispositive of this case. Punitive damages are punishment; they are quasi-criminal "private fines," and if collected are simply a windfall to which a plaintiff has no fundamental claim of right. See *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *cf. City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 266 (1981). "Punitive damages may be employed to punish unpopular defendants," *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 50-51 n.14 (1979)—a category of defendants in which nonresidents and writers of stories critical of local heroes are likely to figure prominently. See *Gertz* v. *Robert Welch, Inc.*, *supra*, 418 U.S. at 350; cf. *New York Times Co.* v. *Sullivan*, *supra*. At least two courts, recognizing this, have held that punitive damages for libel violate the First and Fourteenth Amendments. *Sprouse* v. *Clay Communication, Inc.*, 211 S.E.2d 674 (W. Va.), *cert. denied*, 423 U.S. 882 (1975); *McHale* v. *Lake Charles American Press*, 390 So. 2d 556, 570 (La. App. 1980), *cert. denied*, 452 U.S. 941 (1981). Other states have arrived at the same result applying the free speech and free press guarantees of their own constitutions.[52]

Whether or not punitive damages are allowable at all in libel cases, it is clear that the interest in obtaining them from a nonresident publisher's nonresident employee cannot weigh very heavily, if at all, under *International Shoe*. Indeed, to the extent that in essence such claims are inherently penal, they could be rejected on the

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[52] See *Hall* v. *May Dept. Stores*, 292 Ore. 131, 637 P.2d 126 (1981); *Taskett* v. *KING Broadcasting Co.*, 86 Wash. 2d 439, 546 P.2d 81 (1976); *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 859-60, 330 N.E.2d 161, 169 (1975).

long-recognized ground that nonresident individuals may not be subjected to penal jurisdiction *in absentia*. *Cf. Hopt* v. *Utah*, 110 U.S. 574 (1884).[53]

III. CALIFORNIA'S ASSERTION OF EXTRATERRITORIAL JURISDICTION OVER THESE FLORIDA INDIVIDUALS UNCONSTITUTIONALLY BURDENS INTERSTATE COMMERCE.

It has been recognized at least since *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), that states may not enact laws that place an undue burden on the flow of commerce among the states that is protected by the Commerce Clause, Article I, § 8. See also, *e.g.*, *Edgar* v. *Mite Corp.*, 457 U.S. 624 (1982); Stone, *Fifty Years' Work of the United States Supreme Court*, 8 ORE. L. REV. 248, 252-54, 261-62 (1929). This Court also has held that the statutory assertion by a state of jurisdiction over an out-of-state defendant may itself unduly burden interstate commerce, and be for that reason invalid. Several state jurisdictional statutes as applied to interstate enterprises were rejected on that basis by this Court in a series of opinions by Mr. Justice Brandeis. *Michigan C.R.R.* v. *Mix*, 278 U.S. 492 (1929); *Atchison, T & S.F. Ry.* v. *Wells*, 265 U.S. 101 (1924); *Davis* v. *Farmers Co-operative Equity Co.*, 262 U.S. 312 (1923); see also *Denver & R.G.W.R.R.* v. *Terte*, 284 U.S. 284 (1932); *International Milling Co.* v. *Columbia Transp. Co.*, 292 U.S. 511 (1934).[54]

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[53] When a state seeks to obtain jurisdiction of a nonresident natural person to answer penal claims, the only prescribed method is by extradition. See U.S. CONST., Art. IV, § 2. *International Shoe* has not been applied to penal matters. *Cf. International Harvester Co.* v. *Kentucky*, 234 U.S. 579 (1914). See *State* v. *Luv Pharmacy, Inc.*, 118 N.H. 398, 403-05, 388 A.2d 190, 193-94 (1978).

[54] "While this circumstace might enable plaintiff to try his cause there with less inconvenience than elsewhere, it would not prevent imposition of a serious burden on interstate commerce. And, we have held, it is the infliction of the burden

The same Term that this Court decided *International Shoe Co.* v. *Washington, supra,* it also decided *Nippert* v. *City of Richmond,* 327 U.S. 416 (1946). In *International Shoe* this Court had loosened some of the strict territorial limitations on jurisdiction established in *Pennoyer* v. *Neff,* 95 U.S. 714 (1878). In *Nippert* v. *City of Richmond* this Court in weighing a state's jurisdiction to tax persons "engaged in business as solicitors" referred to its then recent holding in *International Shoe,* and recognized that regular and continuous solicitation of sales in a state might suffice to sustain jurisdiction against a purely due process challenge. 327 U.S. at 426. Nevertheless, said the Court, there were "other prohibited effects." *Ibid.* The Court observed that for many sellers the limitation imposed by the state might be "not only burdensome but prohibitive, with the result that the commerce is stopped before it is begun." *Id.* at 429. This burden would be multiplied by "the cumulative effect, practically speaking, of flat municipal taxes laid in succession upon the itinerant merchant as he passes from town to town." *Id.* at 429-30. The Court emphasized that when state statutes are tested against the Commerce Clause, "practical consequences for the doing of interstate commerce in applications to concrete facts are our concern." *Id.* at 431. State statutes that, like California's long-arm statute, aim particularly at non-residents, are especially subject to scrutiny, because non-residents cannot vote:

> "Provincial interests and local political power are at their maximum weight in bringing about acceptance

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that deprives the courts of jurisdiction over cases like this." *Denver & R.G.W.R.R.* v. *Terte, supra,* 284 U.S. at 287.

In many other contexts this Court realistically has recognized that having to defend in court may itself be an enormous and undue burden. See, *e.g., Hutchinson* v. *Proxmire,* 443 U.S. 111, 123 (1979) (protection "not only from the consequences of litigation's results but also from the burden of defending themselves"); *Helstoski* v. *Meanor,* 442 U.S. 500 (1978); *Abney* v. *United States,* 431 U.S. 651 (1977); *Dombrowski* v. *Eastland,* 387 U.S. 82, 85 (1967); *Dombrowski* v. *Pfister,* 380 U.S. 479, 487 (1965).

> of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against." *Id.* at 434.

The barrier to trade from having to defend suits in distant jurisdictions can well turn out to be more onerous than the burden of paying a tax, and it is far less foreseeable.[55] The burden on interstate commerce weighs even more when imposed through employees of a publisher, not just because of the First Amendment concerns that are involved, see pp. 33-46, *supra*, but also because libel is a type of action in which defense costs are high and the size of jury verdicts (for unquantifiable general damages and for punitive damages) is often enormous and always unpredictable. The burden is not diminished by, as here, seeking to impose the extraterritorial jurisdiction on the publisher's employees—because what inhibits them inevitably inhibits the product of the employer for which they work. And unlike a publishing company, which usually does business as here in corporate form, the liability of an individual to pay a judgment is not limited by law.

State long-arm jurisdictional statutes, like other state intrusions that affect interstate commerce, must be tested under the Commerce Clause to weigh whether the burden is inappropriate. *Froning & Deppe, Inc.* v. *Continental Illinois Bank & Trust Co.*, 695 F.2d 289 (7th Cir. 1982). Unwarranted state assertions of extraterritorial jurisdiction can be a "serious threat and deterrent to the free flow of commerce between the states." *Erlanger Mills, Inc.* v. *Cohoes Fibre Mills, Inc., supra*, 239 F.2d at 507.

Newspapers are a significant part of the free flow of commerce. *Cf. United States* v. *Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1

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[55] It has been recognized that assertions of jurisdiction of a state to tax non-residents, and of jurisdiction to apply judicial power to them, present similar issues. *See, e.g., Erlanger Mills, Inc.* v. *Cohoes Fibre Mills, Inc.*, 239 F.2d 502, 506 (4th Cir. 1956).

(1945). To stifle and inhibit their circulation, by the added threat of expense and punishment for their employees by courts and juries in distant places, would burden not only free trade in commerce, but also "free trade in ideas." [56]

IV. THIS COURT'S JURISDICTION ON APPEAL IS PROPER.

Appellee has argued that the provisions of 28 U.S.C. § 1257(2) do not apply to this appeal because the California statute is drafted on its face to conform to constitutional limits. Therefore, Appellee asserts, "the clear language of this statute makes it clear that it is impossible for it to be unconstitutional on its face or as applied . . . ." Motion to Dismiss or Affirm at 2.

That argument is half tautology and half *non sequitur*. It is correct that by definition a statute drafted in terms to be limited to what is constitutional cannot be unconstitutional *on its face*. But it is certainly not "impossible" for such a statute to be *applied* in an unconstitutional manner; indeed, that is exactly what Appellants have complained of here. J.A. 106. It is well established that when a state statute *as applied* is challenged as repugnant to the United States Constitution and the challenge is rejected by the state court, this Court has jurisdiction on appeal under 28 U.S.C. § 1257(2). See, *e.g.*, *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 440-41 (1979); *Cohen* v. *California*, 403 U.S. 15, 17-18 (1971); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 289 (1921). That principle applies to challenges to long-arm statutes as applied, as well as to others. See, *e.g.*, *International Shoe Co.* v. *Washington*, *supra*, 310 U.S. at 313; *Henry L. Doherty & Co.* v. *Goodman*, 294 U.S. 623, 626 (1935).

Kulko v. *Superior Court*, *supra*, which Appellee cites, involved a different kind of record. In that case, this

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[56] *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Court noted, "Appellant did not argue below that this statute was unconstitutional." 436 U.S. at 90 n.4. Here Appellants *did* so argue to the court below, *e.g.*, J.A. 105, 106, and that court held that the statute could be applied to Appellants nevertheless. It is difficult to imagine how the challenge and rejection could have been clearer.[57]

Under Appellee's novel theory, decisions upholding state statutes challenged as applied could never be heard by this Court on appeal if the statutes were drafted to be constitutional on their face. That notion was long ago rejected. *Dahnke-Walker Milling Co.* v. *Bondurant*, *supra*. This Court has jurisdiction under 28 U.S.C. § 1257(2).[58]

CONCLUSION

For the reasons stated, the judgment should be reversed.

Respectfully submitted,

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June 17, 1983

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[57] The statute also was challenged in the other California courts. See, *e.g.*, J.A. 85, 120-121.

[58] Appellants have requested that if for any reason jurisdiction under 28 U.S.C. § 1257(2) were deemed lacking, the appeal be treated as a petition for certiorari in accordance with 28 U.S.C. § 2103. Jurisdictional Statement at 3 n.1. The jurisdictional requirements for certiorari under 28 U.S.C. § 1257(3) are clearly met.

APPENDIX A

CONSTITUTIONAL PROVISIONS

U.S. CONSTITUTION, ARTICLE I:

"Section. 8. The Congress shall have Power . . .

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."

ARTICLE IV:

"Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which the Acts, Records and Proceedings shall be proved, and the Effect thereof.

"Section. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

"A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime. . . ."

FIRST AMENDMENT:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

FOURTEENTH AMENDMENT:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . ."

APPENDIX B

EXCERPT FROM DEPOSITION OF JOHN ROBERT LUCAS
DECEMBER 14, 1981

* * * *

[151] By Mr. Ablon: Did you ever meet with Mr. John South in California in connection with this article?

A This article?

Q Yes.

A No.

Q Did you ever meet with Mr. South in California?

A Yes.

Q On how many occasions?

A Six or seven.

Q On none of those occasions was this article [152] discussed or dealt with in any degree?

A We weren't—he wasn't allowed to discuss it with me.

Q No, no. I'm not talking before its publication. At the time you were working on the article?

A No.

Q Before it had ever been published, had you ever had occasion to talk to Mr. South about it in California?

A No.

Q To the best of your recollection, how many conversations did you have with Mr. South concerning the subject article or your work in connection with the subject article?

A One conversation.

Q I take it that was a telephone conversation?

A You're right.

Q Other than that one telephone conversation to Mr. South, you had no other conversations with Mr. South or anyone else at the National Enquirer—

A That's correct.

Q —concerning the subject article or the preparation?

A That's correct.

* * * *

No. 82-1401

In The

Supreme Court of the United States

October Term, 1982

IAIN CALDER and JOHN SOUTH,

Appellants,

vs.

SHIRLEY JONES,

Appellee.

On Appeal from the California Court of Appeal
Second Appellate District

BRIEF FOR APPELLEE

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QUESTIONS PRESENTED

1. Must a special First Amendment jurisdictional immunity be accorded members of the press who personally participate in the gathering of information for and the publication of a libelous article?

2. Under standard jurisdictional principles do the Due Process and/or Commerce Clauses preclude California's exercise of jurisdiction over members of the press who commit the tort of libel, knowing that the resultant publication will be widely distributed in California knowing plaintiffs reside there and that the main subject of the article relates to conduct alleged to have occurred in California, and whose investigation was directed there.

3. Does the Due Process Clause permit significant participants in tortious activity outside of California targeted at its residents, to evade jurisdiction simply because the wrongdoing happened to have been accomplished while working for a corporate employer, although a direct result of their personal conduct and activities.

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I. STATEMENT OF FACTS

In or about the middle of September, 1979, Appellant John South ("South"), a writer and reporter for defendant National Enquirer, Inc. ("Enquirer") (J.A. 59-60), telephoned Marty Ingels (Appellee's husband) and Shirley Jones ("Appellee")[1], at their residence in Beverly Hills, California, and read to Mr. Ingels a virtually identical draft of a soon to be published libelous and defamatory gossip article concerning Appellee and her husband (J.A. 78).

The text of the draft as read by South over the telephone charged that Ms. Jones, a well known and highly regarded actress (J.A. 8, 9), was in the habit of drinking so heavily on the set during the taping of her then current television show, "Shirley", that she made production impossible (J.A. 11). The article characterized Ms. Jones as a "crying drunk" who:

> "pours down vodka so fast that at first the crew thought she was drinking water. . . . She starts blurring her lines and by 3 o'clock in the afternoon she's a crying drunk and they have to stop shooting." (J.A. 11).

The article was to be not merely an insignificant item but a large "feature story" (J.A. 28). The draft of the article and the published story also contained numerous defamatory statements about Mr. Ingels (J.A. 11-13) who had an understandably immediate and perceptible emotional and physical reaction upon hearing the proposed story. He left the telephone to be sick, returned, and

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[1]Since the question of jurisdiction by this Court has been reserved until hearing, Shirley Jones will, without waiver of her claims and to avoid confusion, adhere to South and Calder's characterization of themselves as "Appellants" and of herself as "Appellee."

strongly denied to South each and every malicious and untrue element of the proposed article (J.A. 78). Nevertheless, on or about October 9, 1979, the Enquirer, at the direction of Appellant, Iain Calder ("Calder"), the Editor and President of National Enquirer, Inc. (J.A. 24; 8), second in command to only Generoso Pope (J.A. 24), published the libelous and defamatory article, which was subsequently distributed throughout California (J.A. 7-8; 38-39), and the entire North American continent (J.A. 37-41), to the Enquirer's nearly 5,000,000 purchasers (J.A. 38) and millions of other readers. As Appellants knew, California was its state of greatest circulation and subscribership (J.A. 40).

Appellee and Mr. Ingels contacted the Enquirer after publication and demanded that it print a retraction of the gossip, but Calder, whose sole responsibility it was to make such decisions (J.A. 28-29; 76) personally refused to do so (J.A. 29).

Calder's duties at the Enquirer, in addition to deciding whether to retract libelous articles, were, as president, according to his own testimony, to "oversee just about every function of the Enquirer" (J.A. 24), and, as editor, to "oversee the whole editorial process" (J.A. 24),[2] including specifically approving the publication of the subject article, the final page proof of which he reviewed and approved (J.A. 27-28), after South's telephone call to Appellee. It is also inferable that he discussed South's call approvingly with South and others both before and after it was made, since it was the Enquirer's policy to provide celebrities with advance warning of proposed Enquirer articles about them (J.A. 28).

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[2]Appellants trivialize Calder's total control over the publication of this article characterizing him as performing only "routine editorial services" (Appellants' Brief, p. 4).

Moreover, South also had other contacts with California besides the above-described telephone call to Appellee and her husband. His by-line appeared on the article (J.A. 13, 28) and he was primarily responsible for its concoction (J.A. 58-60). In conducting his "investigation" of the story, he had many telephone conversations with persons in California (J.A. 115), including more than one with an acknowledged "source" for the article and personal friend, Jane Chesis, a California resident (J.A. 50, 69-70, 74), with whom he had been dealing in his Enquirer capacity since December, 1978 (J.A. 58). South also had twenty to twenty-five telephone conversations with the only "source" for the Shirley Jones drunkenness on the set charge, John Robert Lucas, in the four months preceding publication of the subject article (J.A. 36) and still another with Betty Hager (J.A. 69, 74). South also interviewed Thom Keith for the article (J.A. 50). South was also provided by Chesis, in August or September, 1979, with at least five California telephone numbers of persons who could provide him with additional information about Appellee or her husband (J.A. 56) which he presumably called. Chesis was paid $50.00 for this information (J.A. 57). These numbers included the Appellee's husband's office and Appellee's home numbers (J.A. 56) which South utilized to reach them and read the article to them in advance of publication. South also spoke with Chesis in California after calling Ingels but before publication (J.A. 71). In their conversation, South said that he thought Ingels' reaction to the article was "quite funny" (J.A. 71). All of these phone calls, along with the many more he must have made to research this feature story, Appellants inaccurately describe as "only four long distance telephone calls" (Appellants' Brief ("AB") 16).

South met with Lucas in California on Enquirer business six times, at least twice prior to publication of the article (J.A. 34). Questioning of South regarding whether any of those California meetings related to this article was prevented by his counsels interposing a newsman's source objection and instruction not to answer (J.A. 35). Both the California Court of Appeal and even the trial court which ruled against Appellee appropriately concluded that South had at least one visit to California related to the subject article (Trial Court at J.A. 94, Court of Appeal at J.A. 115).[3]

Appellants improperly seek to rebut the clearly warranted inferences drawn by both courts below by presenting to this Court Lucas deposition testimony taken months after the trial court hearing and therefore not in the record below nor before this court (AB 16, APP. B). Appellee would very much prefer to present the significant jurisdictionally relevant information she has uncovered in two years since their motion, but feels that she is constrained by the general rule, unheeded by Appellants, that evidentiary matters revealed subsequent to a ruling are no proper part of the appellate record. Suffice it to say that the additional information strongly supports the judgment of the Court of Appeal. If this Court is inclined to permit an exception to the rule and consider such facts, Appellee would urge permission and the opportunity to augment the record as Appellants have done.

With respect to the credibility of the improperly proffered Lucas' testimony, a few observations are appropriate. Mr. Lucas received a "special bonus" from the En-

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[3]Despite the clear evidence below, Appellants apparently relying on the evidence they improperly seek to present for the first time to this Court, state "it was uncontradicted that South did not travel to California in connection with the article" (AB 5).

quirer just prior to the last session of his deposition, reinforcing other evidence suggesting premeditated efforts to assure favorable testimony.[3a] Furthermore, Lucas' deposition, although demonstrably riddled with fabrication and inconsistency, is highly favorable to Appellee in those portions which Appellants have not chosen to reproduce. When that is done, the finding of both courts below, of at least one article related visit to California, was amply justified and is binding upon this Court.

In addition to the above contacts specifically related to the underlying cause, South has had other significant contacts with California. In the four years prior to publication, he made between twenty and forty-four business trips to California of an average length of one to two weeks on Enquirer stories (J.A. 32; 66), and on one such trip sought alternative employment in California since:

> "he had to travel so much out here it would give him more time with his children if he obtained employment here." (J.A. 68).

On still another trip to Los Angeles, after publication of this article, South met with Jane Chesis at Schwab's Drug Store on Sunset Boulevard to discuss her pending deposition in this lawsuit (J.A. 48-51). South also met with Chesis at the Beverly Hillcrest Hotel a week earlier (J.A. 49) regarding Chesis' contacts with Appellee's counsel. They also talked on the telephone many times (J.A. 50), and she had also warned him in Florida, prior to the deposition, that she had been served with process (J.A. 50).

[3a] Michael Hoy, an Enquirer editor, testified that the Enquirer was concerned "whether he [Lucas, the sole source of information concerning Appellee's alleged drinking on the set] was cooperating with Mr. Ingels' lawyers as opposed to our own." So concerned, in fact, that on Iain Calder's approval "because Bobby Lucas was involved in this lawsuit," the "special bonus", which consisted of an "exaggerated claim," was paid. (Depo. Hoy, 6-15-83, p. 104).

South also had approximately a dozen non-Enquirer related personal business acquaintances in California (J.A. 33), suggesting even more contacts than appear on the record, unrelated to his Enquirer dealings.[4] Furthermore, South has on numerous occasions testified in California courts by affidavit in support of nonjurisdictional motions in this case and others (J.A. 86-89).

As to Calder, although his personal appearances in California in connection with the subject article do not appear on the record, he was in personal attendance during virtually the entire trial in the matter of *Carol Burnett v. National Enquirer, Inc.,* Los Angeles Superior Court No. 157213 (J.A. 46-47), another Enquirer celebrity alcoholism libel case, during March, 1981, in which he testified and observed, demonstrating both his knowledge that such stories would lead to litigation in California and the relative convenience of his defending an action there (J.A. 46).

After Calder refused to print a retraction, Jones and Ingels initiated in Los Angeles County Superior Court, on or about November 20, 1979, this action for libel, invasion of privacy and intentional infliction of emotional distress against the Enquirer, South, Calder, and the Enquirer's Los Angeles County distributor, Sunset News Company (J.A. 7-10), alleging that Appellants acted "by virtue of their own motives as individuals" in addition to "acting within the course and scope of their employment." (J.A. 8).

The Enquirer answered the Complaint without contesting jurisdiction, but Appellants moved to quash serv-

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[4]Appellants assert South had no personal business activity in California (AB 5), relying upon Appellants' one page affidavits prepared by counsel, while ignoring the spontaneous deposition testimony of South of "personal business acquaintances" in California.

ice of summons made on them pursuant to California's long-arm statute, Code of Civil Procedure § 410.10 (J.A. 15-16).

Both the trial court which ruled against Appellee and the California Court of Appeal concluded that the jurisdictional facts presented warranted the imposition of jurisdiction.[5] However, the Court of Appeal reversed the trial court's conclusion that there was a special, more stringent jurisdictional analysis required in "First Amendment" cases which would alter the result of the traditional analysis,[6] concluding that jurisdiction over Appellants "must be determined in accord with traditional principles unaffected by First Amendment considerations." (J.A. 111).

In applying traditional jurisdictional principles the California Court of Appeal reasoned that "[e]very state has a natural interest in effects occurring within its territory, even if the act causing those effects was committed elsewhere (*See* Rest. 2d Conf. of Laws, § 37, com. a). . . . If a defendant commits an act or omission outside the forum state *with the intent* to cause tortious effect within the state, the state may exercise jurisdiction over the defendant as to any cause of action arising from the effects." (J.A. 113).

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[5]The trial court stated:

"Indeed if the injury complained of in this case involved a physical injury sustained as a result of a physically defective magazine shipped into California, then the analysis would end at this point and the motion to quash would be denied. [Citation omitted]" (J.A. 95)

[6]The trial court stated:

"The question becomes, then, whether in assessing the fundamental fairness of the proposed assertion of jurisdiction, the Court should weigh and consider additional factors in cases where freedom of the press is involved." (J.A. 95). The trial court did so (J.A. 96).

Finally, the Court of Appeal concluded that the facts warranting jurisdiction over Appellants were unaffected by the fact that they engaged in the wrongful and malicious conduct in the course of their employment with the Enquirer. (J.A. 116-117).

II. SUMMARY OF ARGUMENT

There is no due process restriction on subjecting to jurisdiction significant participants in intentional and willful conduct, not only foreseeably impacting a forum but targeted there.

South's above recited numerous California contacts in investigating the story and callously inflicting emotional distress on Appellee by reading the subject article to her husband at their California residence before publication, not for purposes of assessing its accuracy but to obtain a useful quotation, warrants imposition of jurisdiction wholly apart from the well established "effects doctrine" articulated in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971).

Calder's intentional tortious conduct outside of California, on the other hand, in causing certain injurious effects in California presents the clearest case for adopting the "effects doctrine" which application is well established among the state courts and legislatures.

Appellants' efforts to evade jurisdiction by seeking the creation of new constitutional immunities, a First Amendment derived jurisdictional privilege for the press and a due process derived "fiduciary shield" immunity for intentional wrongdoers acting in the corporate employ, are both legally and logically unwarranted and should be rejected.

The First Amendment privilege sought is not presaged by *New York Times v. Sullivan*, 376 U. S. 254 (1964)

and its progeny nor justified by any logical policy consideration. Its acceptance, in fact, flies in the face of *New York Times* and reflects an end-run around that line of cases to accomplish that which it has precluded.

The "fiduciary shield" immunity, born of confusion, incapable of being logically stated, riddled with internal contradiction, and lacking in reasoned justification is inapplicable to the facts presented and should not, at any rate, be imbued with constitutional significance. Even those few courts which have adopted it as a constitutional principle have done so only when jurisdiction over individual employees is sought to be imposed solely on the basis that the court has jurisdiction over the corporate employer, and not on the basis of any actions or conduct of the individual. It is inapplicable where, as here, jurisdiction is based on the individual's own conduct.

Finally, defendant has failed to demonstrate any unreasonable burden or discrimination against interstate commerce which would justify striking down jurisdiction over Appellants based on the Commerce Clause. Jurisdiction over tortious wrongdoers will not curtail commerce, it will only curtail wrongdoing.

III. ARGUMENT

A. THE FIRST AMENDMENT ACCORDS NEITHER THE MEDIA NOR ANYONE ELSE A SPECIAL JURISDICTIONAL IMMUNITY.

Ignoring the significant rights of libel plaintiffs,[6a] Appellants claim entitlement to a special First Amendment derived jurisdictional preference. (AB 33-46; Amicus Curiae Brief of the Association of American Publishers,

[6a]The importance of the interests which Appellants choose to ignore has perhaps been most succinctly described by Professor Tribe:

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Inc. ("AAP Brief") pp. 8-11; Brief Amici Curiae of the Reporters' Committee for Freedom of the Press, et al. ("RB"), pp. 18, et seq.) Appellants and Amici seek to create and fashion a First Amendment derived protective, jurisdictional umbrella permitting immunized contact with California so long as their contacts are related to publication (AB 19). This special treatment is sought in a factual setting more deserving of Justice White's apt statement:

> "[I]ts freedom [the presses] does not carry with it an unrestricted hunting license to prey on the ordinary citizen." *Miami Herald Pub. Co. v. Tornillo*, 418 U. S. 241, 263 (1974) (White, J., concurring).

The First Amendment has never contemplated creation of a diplomatic immunity or jurisdictional privilege for traveling reporters, stringers or other persons ostensibly trying to uncover information to give, sell or convey to the media. Analogous claims for special treatment to benefit the press have been repeatedly rejected by this Court, and the overwhelming number of well considered lower federal and state court decisions have similarly done so.

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"Both privacy and reputation . . . involve interests of constitutional dimension; when government acts to limit the untrammeled gathering, recording, or dissemination of data or statements about an individual, of course it inhibits speech—but it also vindicates the individual's ability to control what others are told about his or her life. Such control constitutes a central part of the right to shape the 'self' that any individual presents to the world. . . . It is breached, . . . with unmistakable force, when one's good name is deliberately and falsely besmerched, doing violence to one's public identity. Not surprisingly, therefore, defamation has long been regarded as a form of 'psychic mayhem', not very different in kind, and in some ways more wounding, than physical mutilation." TRIBE, AMERICAN CONSTITUTIONAL LAW, pp. 648-649 (1st ed. 1978).

1. The Media Is Entitled To Receive Only The Same Even-Handed Application Of Jurisdictional Law As Other Non-Media Defendants.

Chief Justice Burger, in *First National Bank of Boston v. Bellotti*, 435 U. S. 765, 802 (1978) (concurring opinion), stated:

> "'[T]he purpose of the Constitution was not to erect the press into a privileged institution '. . . the liberty of the press is no greater and no less' . . . than the liberty of every citizen of the Republic. *Pennekamp v. Florida*, 328 U. S. 331, 364 (1946) (Frankfurter, J., concurring)".

This statement appropriately reflects this Court's repeated holdings that the press may be subject to application of laws uniformly applicable to others. *Grosjean v. American Press Co.*, 297 U. S. 233 (1936) (even-handed taxes); *Associated Press v. National Labor Relations Board*, 301 U. S. 103 (1937) (National Labor Relations Act); *Okla. Press Publishing Co. v. Walling*, 327 U. S. 186 (1946) (Fair Labor Standards Act); *Breard v. Alexandria*, 341 U. S. 622 (1951) (ban on solicitation house to house); *Citizen Publishing Co. v. United States*, 394 U. S. 131 (1969) (Sherman Anti-Trust Act); *Branzburg v. Hayes*, 408 U. S. 665 (1972) (revealing sources at grand jury indictment hearing); *Pell v. Procunier*, 417 U. S. 817, 834 (1974) ("[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public"); *Herbert v. Lando*, 441 U. S. 153 (1979) (editorial processes not immunized from discovery in a libel action).

This Court's recent decision in *Minneapolis Star & Tribune Company v. Minnesota Commissioner of Revenue*, 103 S. Ct. 1365 (1983), is totally consistent with the foregoing. As stated in Justice O'Conner's opinion for the Court, the issue there was "a State's power to impose a

special tax on the press and, by enacting exemptions, to limit its effect to only a few newspapers." 103 S. Ct. at 1367. The Court unequivocally reiterated that consistent with the First Amendment *newspapers could be subjected to non-discriminatory, generally applicable regulations.* 103 S. Ct. at 1369-1370.

Appellants and Amici have failed to provide any meaningful authority suggesting that, or why, the ordinary minimum contacts test should not be applied to them.[7] The media's desire to avoid facing the music at all, albeit even the mellifluous *New York Times* symphony composed by this Court for its benefit, is all that is urged in support of their claims.

2. The Substantive Law, Not Procedures, Are Best Suited To Accommodate The First Amendment.

This Court has gone far in recent years in considering the First Amendment by according the press and other defamation defendants significant protections incorporated into the substantive constitutional law of libel. *See, New York Times v. Sullivan, supra;*[8] *Curtis Publishing Company v. Butts,* 388 U. S. 130 (1967); and *Gertz v. Robert Welch, Inc.,* 418 U. S. 323 (1974).

This Court has already determined to confront First Amendment issues in libel cases head-on in the substantive law rather than by indirection in the law of minimum

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[7]As discussed below the now largely discredited view of the Fifth Circuit is about all the authority Appellants can muster.

[8]Some of the protections include: (a) the burden of proving truth cannot be on the defendant, plaintiff must prove falsity 376 U. S. at 279; (b) constitutional malice, knowledge of falsity or reckless disregard for falsity, is required in order for a public figure or public official to prevail, 376 U. S. at 279-280; (c) malice must be proven by "clear and convincing" evidence, 376 U. S. at 285-286; and (d) only damages for actual not presumed injury may be recovered, 376 U. S. at 283-284.

contacts jurisdiction. It has achieved a delicate balance of interests amply protecting libel defendants while at the same time refusing to shut the courthouse door to libeled individuals.

As stated in *Gertz v. Robert Welch, Inc., supra*, "The *New York Times* standard defines the level of constitutional protection appropriate to the context of defamation of a public person." 418 U. S. at p. 342. *New York Times* did not contemplate nor suggest that the balance of interests it achieved should be upset by additional First Amendment protections accorded in the procedural context. *Herbert v. Lando*, 441 U. S 153 (1979).[9]

The stringent First Amendment protections accorded by *New York Times* and its progeny have made the proof in libel actions difficult and extremely costly. *Herbert v. Lando*, 441 U. S. at 176.[10] It is most assuredly these additional burdens and expenses which account for the high expense of defending and prosecuting libel actions (AB 42) and the small number of trial and appellate level defamation cases with mass media defendants (RB 16,

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[9]*Herbert* stated in connection with another asserted special procedural protection claimed by the media:

"Nor did these cases [*New York Times, Curtis Publishing*, and Gertz] suggest any First Amendment restriction on the sources from which the plaintiff could obtain the necessary evidence to prove the critical elements of his cause of action." 441 U. S. at 160.

"[A]ccording an absolute privilege to the editorial process of a media defendant in a libel case is not required, authorized, or presaged by our prior cases, and would substantially enhance the burden of proving actual malice, contrary to the expectations of *New York Times, Butts, and similar cases.*" 441 U. S. at 169.

[10]"The plaintiff's burden [in defamation actions] is now considerably expanded. In every or almost every case, the plaintiff must focus on the editorial process and prove a false publication attended by some degree of culpability on the part of the publisher. If plaintiffs in consequence

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fn. 6).[11]

Despite the fact that *New York Times* and its progeny carefully define the level of protection warranted by the First Amendment, Appellants and Amici seek to redefine it in a significantly different and more burdensome manner as to plaintiffs. Whereas *New York Times* adjusted the substantive law of libel to accommodate important First Amendment concerns, Appellants now seek to impede libel plaintiffs' very access to court.[12]

Such procedural impediments go beyond the burdens imposed by *New York Times*. As stated in *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, 262 (1974) (White, J., concurring):

"... [W]e have cherished the average citizen's reputation interest enough to afford him *a fair chance*

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now resort to more discovery, it would not be surprising; and it would follow that the costs and other burdens of this kind of litigation would escalate and become much more troublesome for both plaintiffs and defendants." 441 U. S. at 176.

[11]The Reporters' Brief cites for the proposition that "Reporters and editors are exceptionally vulnerable to defamation suits" a statistical survey showing such cases increasing as follows: 1977—52; 1978—79; 1979—84; 1980 (through Sept. 30) —76. (RB 16)

Quite to the contrary, it is remarkable that given the vast number of mass media,—11,000 magazines, 1,700 daily newspapers and 7,500 weekly and semi-weekly newspapers (RB 25), —and their voluminous daily output on divergent subjects that so few defamation lawsuits have resulted. The "significant increase" in number of these cases claimed by the Reporters' Brief and alleged attributable to "frivolous plaintiffs" suits (AB 42), or "vulnerable reporters" (RB 16), simply is no cause for alarm given the small numbers involved. Properly interpreted, there have been only a small number of such suits largely because of *New York Times* and its progeny and the additional costs and burdens they have placed on libel plaintiffs.

[12]If a First Amendment jurisdictional privilege is accorded the media, non-public figure or public official plaintiffs will be equally impacted by the immunity potentially having even greater practical consequences on that group.

to *vindicate himself in an action for libel. . . . [H]e has had at least the opportunity to win a judgment.*" [Emphasis added.]

Appellants now seek to make even the opportunity for a "fair chance" more difficult.[13]

3. A First Amendment Immunity For The Press Would Only Create Confusion In The Already Uncertain Area Of Jurisdiction.

Minimum contacts analysis is a difficult one " in which few answers will be written in black and white: the greys are dominant and even among them the shades are innumerable." *Kulko v. California Superior Court*, 436 U. S. 84, 92 (1978). A First Amendment jurisdictional privilege virtually immunizing media defendants, or at least requiring a significantly higher level of contacts to impose jurisdiction, will lay the groundwork for different, varying jurisdictional scrutiny levels for other equally worthy interests. Thus, the shades of gray inherent in even the traditional standard would be multiplied many times over.

Since the "First Amendment does not 'belong' to any definable category of persons or entities: [i]t belongs to all who exercise its freedoms" *First National Bank of Boston v. Bellotti, supra*, at 802, (Burger, C. J., concurring), the jurisdictional preference would appear to apply to any defendant whose contacts with a forum or tortious conduct are effected by "First Amendment" activity. The difficult issue of what persons and what types of First Amendment activity might be subject to this special First Amendment jurisdictional consideration would be raised.

In short, minimum contacts analysis should not be further encumbered or needlessly complicated.

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[13]Though the Enquirer did not contest jurisdiction in this case, the jurisdictional immunity which Appellants urge would arguably insulate the Enquirer, and other nationwide publications, so long as their activities were First Amendment related.

4. In Light Of The De Minimus "Chilling Effect," Practical Considerations Compel Rejecting A Special First Amendment Minimum Contacts Test.

Appellants contend that failure to impose a special First Amendment jurisdictional standard, will have a chilling effect on the free press (AB 44), significantly elevate litigation costs (AB 44), and place the press in a position to be blackmailed by "frivolous suits" (AB 42).

However, upon analysis, Appellants' contentions reduce to nothing more than a claim that any time a media defendant is called to answer for its actions there is a "chilling effect." For, the additional "chill" created by suits away from Appellants' principal place of business is only marginally greater than the alleged "chill" from any lawsuit including one right next door.[14] However, that "chill" is the very "chill" which *New York Times* found acceptable in balancing First Amendment rights against those of defamed individuals seeking redress.[15] Furthermore:

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[14]It takes little understanding of the litigation process to appreciate that most pre-trial hearings are conducted by affidavit that can be supplied with equal ease from outside the forum as within. Further, depositions of Appellants cannot be compelled in California (California Code of Civil Procedure § 2019), nor can they even be compelled to attend trial in California. Thus, the only practical additional burden would be Appellants' actual, non-compelled attendance at trial which is comparatively insignificant to the overall costs in such litigation.

[15]*Herbert* v. *Lando, supra,* at 171 aptly stated:

> "But if the claimed inhibition flows from fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely what *New York Times* and others cases have held to be consistent with the First Amendment. Spreading false information in and of itself carries no First Amendment credentials. '[T]here is no constitutional value in false statements of fact' [Citation omitted]."

> "[T]he press . . . is steadily becoming more powerful and much less likely to be deterred by threats of libel suits." *Miami Herald Publishing Co. v. Tornillo, supra,* at 263. (White, J., concurring).

This statement is particularly poignant at bar applying to a publication of vast national circulation, resources and readership, and its principal employees.

Appellants' contentions that the costs of defending suits in other forums will make litigation prohibitive is empirically unsupported and, interestingly, made by Florida parties employing Washington, D. C. counsel to represent them as lead counsel in California litigation, an indisputably more expensive means of defense than obtaining local California counsel.[16] This is hardly the conduct of parties teetering on the brink of being "wipe[d] out . . . financially" (AB 42).[17]

Appellants' claim that failure to accord them jurisdictional immunity will enhance the likelihood of "frivolous suits" is equally meritless.[18] If there is any risk of

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[16]Use of Washington, D. C. counsel, of course, adds to long distance telephone charges, federal express charges and extensive air fare, hotel, legal fees and other traveling expenss, incurred each time a hearing or deposition is scheduled in California.

[17]It should be further observed that counsel for Appellants have adopted a defense strategy in connection with their representation of the Enquirer and Sunset News Distributing, of exhaustive discovery and use of the appellate process as evidenced by its Petition for Certiorari to this Court just two months after this Petition. *National Enquirer, Inc. v. Superior Court of California, cert. denied* 51 U.S.L.W. 3902 (1983) (No. 82-1770). Though this defense strategy is a permissible one, Appellants should not now be heard to complain of the costs involved.

[18]Without justification, Appellants suggest that Ingels' dismissal of this matter demonstrates that this is just such a "frivolous suit." However, such inaccurate, irrevelant, and idle speculation ignores the multitude of other possible, more likely, and here present explanations for such action, such as the cost to him of maintaining both his and Appellee's lawsuit in the face of a "billions for defense" strategy.

frivolous suits, it is equally present in locally filed actions. Furthermore, substantive and procedural state laws are designed to prevent and/or penalize frivolous suits such as by authorizing civil suits for malicious prosecution. Clearly, *The Length of The Long Arm*, 9 J. OF PUB. L. 293, 302 (1963).

In the modern world it is ludicrous to suggest that large national publications and their key employees will fail to publish controversial stories that can be gathered only out of state, which they perceive will enhance circulation, simply because they may be sued there.

When put in proper perspective, the additional cost of litigating in a distant forum is comparatively small when compared to the costs of litigating a libel matter at all. The horrible consequences suggested by Appellants for failure to provide them special insulation from jurisdiction are more hypothetical than real.

5. The Courts Which Have Decided This Precise Issue, Have Overwhelmingly Rejected Adoption Of A First Amendment Jurisdictional Test.

Though Appellants claim that "the majority of state and federal courts that have considered the issue have unhesitatingly applied the First Amendment's speech and press protections as part of their analysis of extraterritorial jurisdiction" (AB 37-38), in fact, quite the contrary is the case. The only federal circuit court to accept that proposition is the Fifth Circuit in *New York Times Company v. Connor*, 365 F. 2d 567 (5th Cir. 1966), and subsequent cases. *See, E. G. Walker v. Savell*, 335 F. 2d 536 (5th Cir. 1964); *Wolfson v. Houston Post*, 441 F. 2d 735 (5th Cir. 1971); *Edwards v. Associated Press*, 512 F. 2d 258 (5th Cir. 1975); and *Cox Enterprises, Inc. v. Holt*, 678 F. 2d 936 (11th Cir. 1982).[19]

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[19]The Cox court, in the Eleventh Circuit, which was recently created out of the Fifth Circuit, owed its reliance on *Connor* to the fact that it considered itself bound by 'applicable law previously developed in the former Fifth Circuit.' 678 F. 2d at 937.

It should be noted that Professors Leflar and Weinstein, whom Appellants view to be in their camp (AB 39), wrote prior to *New York Times v. Sullivan.* Thus, they were unaware of the stringent protections which this Court would shortly thereafter place in the substantive law of libel. Their concern for adding procedural protections in the absence of any protections at all is therefore understandable.[20]

The *Connor* case has itself been limited and qualified by subsequent Fifth Circuit opinions. In *Curtis Publishing Company v. Golino,* 383 F. 2d 586, 590-591 (5th Cir. 1967), *Connor* was limited to the newspaper situation it presented, excluding from its ambit cases involving magazines. *Edwards v. Associated Press,* 512 F. 2d 258, 266 (5th Cir. 1975), further undercut *Connor* by stating that it indicated "not so much a rule as it expresses a cautionary note" and acknowledged that *Connor* had "not been greeted with enthusiasm" (512 F. 2d at p. 266, n. 29). "The majority of recent cases have rejected *Connor,* concluding that First Amendment considerations are irrelevant to a jurisdictional analysis." Scott, *Jurisdiction Over The Press: A Survey And Analysis,* FED. COM. L. J. 32: 19-53, 19 (1980).

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[20]Appellants suggest that RESTATEMENT (SECOND) CONFLICT OF LAWS, § 37 at 159 (1971) supports their claim that the First Amendment must be considered (AB 39). However, such recitation is misleading. It ignores the clearly non-committal term "may" and that section's earlier caveat that:

> *"The Institute expresses no opinion whether in situations where the interests of the defendant are protected by the First and Fourteenth Amendments of the Constitution, it is necessary that a State have a more substantial basis for the exercise of judicial jurisdiction over a non-resident defendant than would otherwise be required."* (Emphasis added.)

Weighed against this scant and discredited Fifth Circuit authority are the decisions of the Second, Ninth and Tenth Circuits rejecting *Connor*. The Ninth Circuit in *Church of Scientology v. Adams*, 584 F. 2d 893, 899 (9th Cir. 1978), observed that the proposition that there is increased protection from jurisdiction in First Amendment cases is one whose

> ". . . soundness is open to question . . . [W]e observe that first amendment protections are better developed in the context of substantive defenses on the merits rather than at the initial jurisdictional stage of a defamation proceeding."

In *Anselmi v. Denver Post*, 552 F. 2d 316, 324 (10th Cir.) *cert. denied sub nom., Times Mirror Co. v. Anselmi*, 432 U. S. 911 (1977), the Tenth Circuit stated:

> "Whether there is a First Amendment defense is to be determined when the case is tried and not as a matter of reason and logic affect the outcome of a personal jurisdiction question such as we have here. . . . To hold as did the Fifth Circuit that the First Amendment has to be thrown on the scales as an added impediment in media cases gives to the media an additional arrow which is not appropriate in a determination as to whether the contacts are legally sufficient to constitute due process."

In *Buckley v. New York Post*, 373 F. 2d 175, 182 (2nd Cir. 1967), Judge Friendly, in addition to referring to the "vague First Amendment standard" of *Connor*, pointedly observed:

> "We cannot but wonder whether the Connor court would have felt the same way if the *dramatis personae* instead of being 'Bull' Connor and a newspaper internationally known for its high standards, had been an esteemed local educator or clergymen and an *out of state journal with a taste for scandal* which had circulated 395 copies of a libel stating he had corrupted the morals of the young." (Emphasis added.)

Appellants inaccurately suggest that *Buckley* supports their position citing Judge Medina's concurring opinion (AB 38) (RB 20).[21] It is interesting, that Appellants have emphasized Judge Medina's concurring opinion, for Judge Friendly's opinion for the court has been acknowledged to criticize the *Connor* formula.[22]

Lower state and federal court decisions have similarly rejected a special First Amendment jurisdictional test. In *Johnstone v. Time, Inc.*, 321 F. Supp. 837, 846 (D. N. C. 1970), the court rejected it based upon the changes in substantive defamation law established by *New York Times v. Sullivan* and its progeny. The majority of other state and lower federal court cases and commentators considering such a First Amendment jurisdictional preference are in accord in rejecting it.[23]

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[21]AAP Brief, 7, fn. 4, also cites *Buckley v. New York Post, supra.*

[22]*See, Jurisdiction Over The Press: Survey and Analysis,* FED. COM. L. J. 32: 19-53, 19, fn. 4 (1980), which article counts *Buckley v. New York Post, supra,* among those cases not warmly receiving *Connor; Edwards v. Associated Press, supra,* where the Fifth Circuit itself cites *Buckley v. New York Post Corporation* for the proposition that *Connor* "has not been greeted with enthusiasm."

[23]*Cordell v. Detective Publications, Inc.*, 307 F. Supp. 1212, 1216 (E. D. Tenn. 1968); *Novel v. Garrison*, 294 F. Supp. 825, 833 (N. D. Ill. 1969). "The soundness of applying these First Amendment considerations to jurisdiction questions has been questioned"; *David v. National Lampoon, Inc.*, 432 F. Supp. 1097 (D. S. C. 1977); *Sipple v. Des Moines Register and Tribune Company*, 82 Cal. App. 3d 143, 147 Cal. Rptr. 59 (1978); *Long-Arm Jurisdiction over Publishers: To Chill a Mocking Word*, 67 COLUM. L. REV. 342 (1967); *Due Process And First Amendment Considerations In Libel Cases*, 52 IOWA L. REV. 1034 (1967); and, *Constitutional Limitations to Long-Arm Jurisdiction In Newspaper Libel Cases*, 34 U. CHI. L. REV. 436 (1967). *See also*, libel cases in which the ordinary standard of jurisdiction was applied with no special First Amendment consideration; e. g., *McGuire v. Brightman*, 79 Cal. App. 3d 776, 145 Cal. Rptr. 256 (1978).

The federal district court cases cited by Appellants are all cases which while containing some language indicating acceptance of the discredited *New York Times v. Conner* are otherwise inapposite.[24]

This court has already created significant protections for the media in libel actions. To manipulate jurisdictional law to accord further media protection, while curtailing plaintiffs' access to court, is unwarranted and unnecessary. The proper balance has already been achieved.

B. APPLYING THE TRADITIONAL MINIMUM CONTACTS TEST, THE DUE PROCESS CLAUSE PROVIDES NO SANCTUARY FROM JURISDICTION TO THOSE WHO ENGAGE IN INTENTIONAL AND MALICIOUS TORTIOUS ACTIVITY IN ONE STATE AIMED AT AND CAUSING INJURIOUS EFFECTS TO RESIDENTS OF THE FORUM.

It is clear that since there is no special First Amendment jurisdictional immunity, the traditional minimum contacts analysis is appropriate. However, before it can be applied the inapplicable hypotheticals alluded to by Appellants and Amici, to buttress the "publisher's plight" (AAP Brief, 10) which they claim to exist, must be clearly distinguished from the factual reality presented.

The AAP Brief talks about suits in "remote jurisdictions" (AAP Brief, 8) though this suit was filed where

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[24]*See, e. g., McCabe v. Kevin Jenkins & Associates, Inc.*, 531 Fed. Supp. 648 (E. D. Pa. 1982) (turning on the narrower long-arm statute of Pennsylvania and substantially lesser contracts.); *Margoles v. Johns*, 333 Fed. Supp. 942 (D. D. C. 1971), *aff'd.* 483 F. 2d 1212 (D. C. Cir. 1973) (decided as a matter of interpretation of a Washington, D. C. long-arm statute which was not as broad as California's, and at any rate its favorable reference to the *New York Times v. Connor, supra,* was not even commented upon nor referred to in the affirming circuit court opinion.); *Gonzales v. Atlanta Constitution*, 4 Media Law Reporter, 2146 (N. D. Ill. 1979) (an unofficially reported opinion relying without analysis on the much discredited *Connor* case.).

Appellants knew plaintiff resided, where the entertainment industry about which they wrote was located, where much of their investigation (numerous telephone calls and at least one visit by South) was focused, where the Enquirer had nearly 60,000 subscribers and a total circulation in excess of 600,000, and where South made dozens of visits on Enquirer and personal business in the years immediately prior to publication. The AAP Brief talks of "forum shopping" (AAP Brief, 3) ignoring the fact that this lawsuit was filed at the residence of plaintiff without regard to obtaining forum shopping advantages.[25] The AAP Brief talks of getting a publisher into court simply because it had the "good fortune of selling a small number of works in that jurisdiction", though the Enquirer sold over one-half million copies of the subject article in California.

Other claims of Appellants are particularly meritless in the facts presented. Though participants in the writing and publication of a vicious article asserting that a professional entertainer was "a crying drunk" in connection with her professional endeavors, they now suggest that injury from such a story is "more easily feigned" than physical injury (AB 31).[26]

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[25]Suit at the residence of plaintiff was viewed as a significant factor in *International Milling Co. v. Columbia Transp. Co.*, 292 U. S. 551, 520 (1933), *Roy v. North American Newspaper Alliance*, 106 N. H. 92, 205 A. 2d 844 (1964) and clearly distinguishes the facts of *Keeton v. Hustler Magazine, Inc.*, 682 F. 2d 33, *cert. granted* 51 U. S. L. W. 3552 (1983) (No. 82-485) where suit was not initiated at plaintiff's residence. It is interesting that though Appellants utilized *Keeton* extensively in their "Statement As To Jurisdiction" pp. 20-21 in order to obtain a hearing by this Court, they omit even a cursory reference to it in their Brief. The reason is apparent; when contrasted with the facts in *Keeton* the facts at bar cry out for sustaining jurisdiction.

[26]TRIBE, AMERICAN CONSTITUTIONAL LAW, at 648-649 (1st ed. 1978) has analogized the injury from a libel to the most

(Continued on next page)

Finally, Appellants assert that the California Court of Appeal was incorrect in presuming intention to cause injury to plaintiffs, "jurisdiction by allegation" (AB 31; RB 13-14), despite the fact that the article speaks for itself with regard to intention, and South with Calder's presumed knowledge, called Appellee and her husband before publication, read the article, and was specifically told that it was false and devastating yet published in virtually the identical form read. In the light of such evidence, to call this "jurisdiction by allegation" is to misread the facts.[27] Furthermore, the relevant jurisdictional contact is intent to cause *effects* in California not necessarily intent to injure.[28] The intent to cause effects is manifest in the facts presented.[29]

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injurious of physical crimes, mayhem. With mayhem at least the possibility of full recovery from the physical injuries exists. The truth however, never catches up with the lie. *See also, Abbott Power Corp. v. Overhead Electric Co.*, 60 Cal. App. 3d 272, 278-279, 131 Cal. Rptr. 508, 512 (1976).

[27]The purpose of this assertion is simply to require a full trial to determine intent and thus makes jurisdiction on that ground nearly impossible. As stated in *United States v. Montreal Trust Co.*, 358 F. 2d 239, 242 (2d Cir. 1966), *cert. denied* 324 U. S. 982 (1966):

> "The District Court, in dealing with this issue . . . placed a too heavy a burden on the government in requiring it to establish a strong factual basis upon which jurisdiction is predicated in this case. At this early stage of the proceedings, the government should not have been required to submit proof which would, in effect, establish the validity of its claim and its right to the relief sought."

[28]Although even that intent is properly inferred from the record.

[29]Appellants ignore the special significance of the fact that their conduct was intentionally aimed at California. Fortunately, this factor has not escaped notice by well reasoned opinions. *Murphy v. Erwin-Wasey, Inc.*, 460 F. 2d 661, 664 (1st Cir. 1972).

> "The element of intent also persuades us that there can be no constitutional objection to Massachusetts asserting jurisdiction. . . ."

When the law is properly analyzed and applied to the true facts without Appellants' hyperbole, it is clear that due process presents no barrier to jurisdiction over Appellants.

1. The Applicable Jurisdictional Principles.

At bottom, the jurisdictional principles here are grounded on notions of equity and fairness as set forth in *International Shoe Co. v. Washington,* 326 U. S. 310 (1945). Thus, exercising jurisdiction does not offend due process if the defendant has:

> "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' [citation omitted]. 326 U. S. at p. 316.
>
> "Those demands [of due process] may be met by such contacts . . . as make it reasonable . . . to require the corporation to defend . . . there." 326 U. S. at p. 317.[30]

In *McGee v. International Life Insurance Co.,* 355 U. S. 220 (1957) in a commercial, non-tort context this Court concluded that even an isolated contact which had a "substantial connection with that state" (355 U. S. at 223) was a sufficient basis for jurisdiction applying *International Shoe* principles.

At bar it is neither unfair nor violative of traditional notions of fair play to subject persons engaging in intentional wrongful conduct directed at a particular state to jurisdiction in that state when those very acts cause the foreseen injury.

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[30]Though *International Shoe* dealt with jurisdiction over a corporation its precepts are clearly applicable to individual defendants. *Shaffer v. Heitner,* 433 U. S. 186, 204, fn. 19 (1976). Cleary: *The Length of the Long Arm,* 9 J. OF PUB. L. 293, 298 (1963) ("Distinctions In Principle No Longer Exist Between Individuals and Corporations for Purposes of Jurisdiction."). Cleary and Seder, *Extended Jurisdictional Bases for the Illinois* Courts, 50 N. W. U. L. REV. 599, 603 (1955). Foster, *Personal Jurisdiction Based on Local Causes of Action,* WIS. L. REV. 522, 544-45 (1956).

2. The "Effects Doctrine" Is Well Grounded In Logic And Legal Authority Warranting Its Adoption In The Factual Context Presented.

a. The Issue Presented At Bar.

At bar, South's contacts with California were sufficient to justify exercising jurisdiction over him without resort to the "effects doctrine."[31] He made many telephone calls to California in his investigation of the article, made at least one visit to California to meet with a source of the subject article concerning it and telephoned Appellee and her husband to read them the article before publication, thereafter wholly ignoring their protests of falsity.

Calder, on the other hand, admittedly will be subject to jurisdiction only if this Court accepts the "effects principle" as applied to the intentionally tortious conduct in which he was substantially involved.

In determining whether the "effects principle" comports with due process, it is noteworthy that it is not presented in the context of complex business transactions in one state whose economic and other effects in another state evade easy anticipation and control. Also not presented is the situation of an unintentional act in one state causing unforeseeable consequences in another nor even an unintentional act in one state causing effects which were foreseeable but unforeseen. Rather, it is the clearest possible case for application of the "effects doctrine": an act done outside the forum state with the express intention of causing effects in the forum.

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[31] As properly stated by the California Court of Appeal: "[A]part from the tortious effect which his Florida activities produced in California, South had other contacts with California sufficient to permit the courts of that state to assume personal jurisdiction over him in this action." (J.A. 115).

b. The Authors Of The Restatement Have Clearly Adopted The Logic Of The "Effects Doctrine".

Section 37 of the RESTATEMENT (SECOND) CONFLICT OF LAWS (1971), states:

> "A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individuals relationship to the state make the exercise of such jurisdiction unreasonable." (at p. 156).

The rationale behind the "effects doctrine" is that:

> "A state has a natural interest in the effects of an act within its territory even though the act itself was done elsewhere."

The Restatement posits three situations to which this principle might apply:

> (1) The act was done with the intention of causing effects in the state; (2) the act, although not done with the intention of causing effects in the state, could reasonably have been expected to do so; and (3) the act was not done with the intention of causing effects in the state and could not reasonably have been expected to do so." (at p. 157).

With respect to the first of three situations, presented at bar, the Restatement continues:

> **"The act may have been done with the intention of causing effects in the state. If so, the state may exercise the same judicial jurisdiction over the actor, or over the one who caused the act to be done, as to causes of action arising from these effects as it could have exercised if these effects had resulted from an act done within its territory. . . . So one who intentionally shoots a bullet into a state is as subject to the judicial jurisdiction of the state as to causes of action arising from the effects of the shot as if he had actually fired the bullet in the state. . . ."**

The analogy of shooting a bullet across state lines to the facts at bar is perfect. Rather than being the primary

participants in the shooting of a bullet into California, Appellants were primary participants in the sending of a known, equally pernicious object into California, the devastating article about Appellee. Furthermore, they knew Appellee resided in California, the article would be widely circulated there, and that the subject of the article involved California activities.

The compelling logic behind Section 37 as applied at bar is simple: traditional notions of fair play and substantial justice are not offended in subjecting to jurisdiction individuals engaging in tortious conduct knowing it will have devastating effects in a distant state. To conclude otherwise would be to allow wrongdoers to artificially erect state boundaries for their jurisdictional benefit when they ignored those same boundaries in doing their wrong. Neither traditional notions of fair play and substantial justice, nor the "interstate judicial system's interest in obtaining the most efficient resolution of controversies"[32] poses any impediment to a state's self-defensive exercise of jurisdiction in such circumstances.

c. Courts Considering Section 37 Have Generally Adopted It And Its Principles.

Numerous state and federal courts considering Section 37 of the Restatement, have expressly adopted it.[33]

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[32] *World-wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 292 (1980).

[33] See, for example, *Mississippi Interstate Express, Inc. v. Transportation, Inc.*, 681 F. 2d 1003 (5th Cir. 1982) (applying § 37 to a breach of a Mississippi centered contract and resultant damage in Mississippi); *Rusack v. Harsha*, 470 F. Supp. 285, 291 (M. D. Pa. 1978) (where a copy of a defamatory letter was sent into the state of Pennsylvania, the court relying on § 37 found jurisdiction in a libel action resulting therefrom); *Anderson v. Luitjens*, 311 Minn. 203, 247 N. W. 2d 913 (1976) (adopted § 37 in connection with torts causing injury in the state); *Blessing v. Prosser*, 141 N. J. Super. 548, 359 A. 2d 493, 494 (1976) (§ 37 applied to effects not even causatively related to claim); *Abbott Power Corp. v. Overhead Electric Co.*, *supra*.

The commentators have also looked favorably on that Section's "effects principle." Clearly: *The Length of the Long Arm, supra,* at pp. 299-300.[34]; Reese and Galston; *Doing An Act Or Causing Consequences As Bases Of Judicial Jurisdiction,* 44 IOWA L. REV. 249 (1958).[35] *See* 4 C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1069 (1969).[36]

Further, the overwhelming number of states which have considered the application of the "effects doctrine" to facts similar to those presented here, tortious conduct outside of a state causing injurious effects within, have concluded that it provides ample due process basis for jurisdiction.[37] Some have even embodied that principle

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[34]Professor Clearly in analogizing to the English view with respect to criminal law, found such effects principle consistent with *International Shoe.*

[35]Stating at p. 260:

> "Causing consequences in a state by means of an act done elsewhere may afford the state a basis of judicial jurisdiction over the actor. The clearest situation is where an act is done in one state with the intention of causing consequences in another."

[36]"Even an act done outside the state that has consequences within the state should suffice as a basis for jurisdiction in a suit arising from those consequences if the effect could reasonably have been expected to follow from defendant's conduct."

[37]*See,* for example, *Brown v. Flowers Industries, Inc.,* 688 Fed. 2d 328 (5th Cir.) *cert. denied,* at 51 U. S. L. W. 3650 (1983); *Vishay Intertechnology, Inc. v. Delta International Corporation,* 696 Fed. 2d 1062 (4th Cir. 1982); *Paolino v. Channel Home Center,* 668 F. 2d 721, 724 (3rd Cir. 1981); *Bangor Punta Operations, Inc. v. Universal Marine Company, Ltd.,* 543 F. 2d 1107, 1110 (5th Cir. 1976); *National Egg Company v. Bank Leumi le-Israel, B.M.,* 504 F. Supp. 305 (N. D. Ga. 1980); *Pfeiffer v. International Academy of Biomagnetic Medicine,* 521 F. Supp. 1331 *(W. D. Mo. W. D. 1981) ("commission of a tortious act within* the state includes extraterritorial acts producing actionable consequences in Missouri" at 1335); *Hitt v. Nissan Motor Company, Ltd.,* 399 F. Supp. 838, 847 (S. D. Fla. 1975), vacated

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in statute.[35]

d. The Decisions Of This Court Support Acceptance Of The "Effects Doctrine".

The decisions of this court have tacitly accepted the "effects doctrine" as applied to tortious conduct, and particularly to intentional, and foreseeable tortious conduct.

McGee v. International Life Ins. Co., supra, cited with approval the case of *Smyth v. Twin State Improvement Co.*, 116 Vt. 569, 80 A. 2d 664 (1951). In *Smyth*, the Court was confronted with isolated negligent tortious activity in the forum. Thus, in adopting the position that "it is sufficient for purposes of due process that the suit was based on a contract which had a substantial connection with that state," and citing *Smyth, supra,* in support of this position, *McGee* strongly implies that isolated tortious conduct would also be sufficient to meet due process.

As Justice Brennan has stated:

"[J]urisdiction can be based strictly on out-of-state acts having foreseeable effects in the forum state.

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on other grounds, 552 F. 2d 1088 (5th Cir. 1977); *Maricopa County v. American Petrofina, Inc.*, 322 F. Supp. 467 (N. D. Cal. 1971); *Grey v. American Radiator and Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N. E. 2d 761 (1961); *Ehlers v. United States Heating and Cooling Manufacturing Corp.*, 267 Minn. 56, 124 N. W. 2d 824 (1963); *Dodgett v. Electronics Corp of America*, 93 Idaho 26, 454 P. 2d 63 (1969); *De Cook v. Environmental Secur. Corp., Inc.*, 258 N. W. 2d 721 (Ia. 1977); *Kailieha v. Hayes*, 56 H. 306, 536 P. 2d 568 (1975); *State ex rel. Academy Press v. Beckett*, 282 Or. 701, 581 P. 2d 496 (1978).

[35] *For example, see,* MICH STAT. ANN. § 27A.705(2) (1976) ("The doing or causing an act to be done, or consequences to occur, in the state resulting in an action for tort.") N. D. CENT. CODE, Rules Civ. P. 4(b)(2)(C) (Supp. 1981) ("committing a tort within or without this state causing injury to another person or property within this state") 42 PA. CONS. STAT. ANN. 5322(a)(4) (Purdon 1981) ("causing harm or tortious injury in this commonwealth by an act or omission outside this commonwealth"); *See also,* S. D. CODIFIED LAWS ANN., Tit. 15, ch. 15-7-2(2) (1967).

> E.g., *McGee v. International Life Insurance Co., supra; Gray v. American Radiator and Standard Sanitary Corp., supra;* Restatement, Section 37." *Shaffer v. Heitner,* 433 U. S. 186, 226 (1976), (Brennan, J., concurring and dissenting opinion).

This proposition has been firmly established among the federal circuit courts.[39]

Recent minimum contacts cases of this Court support application of the "effects doctrine" to intentional tortious activity. *Kulko v. California Superior Court, supra,* discussed the "effects test" of Restatement § 37. While refusing to apply it in the non tort context presented, the Court made clear that based upon

> "the examples accompanying § 37 in the Restatement, *this section was intended to reach wrongful activity outside of the State causing injury within the State, see, e. g.,* Comment *a,* p. 157 (shooting bullet from one State into another), . . ." (Emphasis added). 436 U. S. at p. 96.

Worldwide Volkswagen Corp. v. Woodsen, supra, the only recent minimum contacts case before this Court dealing with alleged tortious conduct outside a forum causing injurious effects within, did not so much as cite, let alone discuss, Restatement § 37[40] However, it is clear from

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[39] *Brown v. Flowers Industries, Inc., supra, Vishay Intertechnology, Inc. v. Delta International Corporation, supra; Paolino v. Channel Home Center, supra; Bangor Punta Operations, Inc. v. Universal Marine Company, Ltd., supra; Great Western United Corp. v. Kidwell,* 577 F. 2d 1256 (5th Cir. 1978) *rev'd other grds* 443 U. S. 173 (1979); *Travis v. Anthes Imperial Limited,* 473 F. 2d 515 (8th Cir. 1973); *In Flight Devices Corporation v. Van Dusen Air, Inc.,* 466 F. 2d 220 (6th Cir. 1972).

[40] *Worldwide Volkswagen* did not intend to preclude the tortious conduct without the forum/injury within exercise of long-arm jurisdiction *Paolino v. Channel Home Center, supra,* 668 F. 2d at 725.

its analysis that jurisdiction in the facts presented at bar is consonant with due process.

In *Worldwide Volkswagen Corp.*, a New York automobile retailer and a New York distributor, among others, were sued in Oklahoma where an automobile sold by them in New York happened to be involved in a collision. This Court rejected the argument that simply because an automobile is mobile, and could therefore foreseeably find its way to any state, defendants could be subjected to jurisdiction in any state. The Court stated:

> "This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. *Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being hailed into court there.* [Citations omitted]" (Emphasis added.) 444 U. S. at p. 297.

If this were not the case:

> "[e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel." 444 U. S. at p. 296.

Worldwide Volkswagen rejected the notion that jurisdiction may be predicated solely upon an act committed outside of the forum with no intention of causing effects therein when the foreseeability is no more specific than that the product could end up anywhere. Note, 49 U. M. K. C. L. Rev. 78, 82 (1980-81).[41]

Foreseeability as utilized in *Worldwide Volkswagen* was for the purpose of

> "giv[ing] a degree of predictability to the legal system that allows potential defendants to structure their

[41] "However, *the mere chance circumstance of a product being in the state is not* an adequate contact."

primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." 444 U. S. at 297.

The facts at bar present the very type of foreseeability which *Worldwide Volkswagen* found significant. The libelous article has not been appointed Appellants' agent for service of process in any and every state in which it might circulate. The question of whether Appellants could be subject to jurisdiction in any state besides California is not presented.[42]

A person involved in publication of an article can readily anticipate consequences in the state where the subject of a written attack resides, when it is known that the writing will be distributed there. Thus, *Worldwide Volkswagen's* concern that a defendant be able to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit," (444 U. S. at 297) is easily satisfied. Not only did Appellants engage in conduct intentionally and knowingly directed at California, they were specifically advised of its falsity and potential for injury by Appellee and her husband before publication.

California has merely done what any interpretation of the due process clause would permit, protect itself and its residents from those who would engage in conduct outside its borders intended to injure it or its residents.

3. The Better Reasoned Decisions Of State And Federal Courts Justify Jurisdiction.

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[42] If the present matter related to an effort to subject Appellants to jurisdiction in, for example, Nebraska, having no apparent relationship to the plaintiffs and/or subject matter of the article, simply because the Enquirer had circulation there, than a close question under *Worldwide Volkswagen* might be presented.

In *Church of Scientology of California v. Adams, supra,* the court sensitively dealt with the question of when jurisdiction in libel actions comports with due process, stating:

> "In a libel case, however, we do not think the likelihood that an offending publication will enter a forum is a fair measure of the reasonableness of the exercise of jurisdiction over a publisher. The nature of the press is such that copies of most major newspapers will be located throughout the world, and we do not think it consistent with fairness to subject publishers to personal jurisdiction solely because an insignificant number of copies of their newspapers were circulated in the forum state. *In a defamation case, therefore, the appropriate jurisdictional analysis should be to determine whether or not it was foreseeable that a risk of injury by defamation would arise in the forum state.* . . . 584 F. 2d at 897-898. (Emphasis added.)
>
> "In the present appeal, California events were not the topic of the allegedly actionable writings, nor were California readers a principal or secondary target of the articles. No research was done in California and the articles were not written in that state. The only mention of a California resident was by way of reference to a person who spoke as a representative of the national Scientology organization." 584 F. 2d at 898.

The precepts of *Adams* are particularly applicable at bar. Here, the article deals specifically with a California resident, California actions, California readers were obviously the primary target of the article, and research by telephone and personal visit clearly focused on that state.

Another pertinent authority is *Brown v. Flowers Industries, supra,* to which this Court denied certiorari just last term. There, a Mississippi resident sued, among others, an individual who was an Indiana resident and president of one of the corporate defendants. The complaint alleged conspiracy to cause economic and other injuries accomplished by means of a single defamatory telephone

call from the individual in Indiana to Mississippi. The Fifth Circuit overturned the trial court's conclusion that basing jurisdiction upon the single defamatory telephone call into the state of Mississippi did not comport with due process, stating:

> "The number of contacts with the forum state is not, by itself, determinative. [citations omitted]. What is more significant is whether the contacts suggest that the non-resident defendant purposely availed himself of the benefits of the forum state. [citation omitted]."
>
> " 'When a defendant purposely avails himself of benefits and protection of the forum's laws—by engaging in activity . . . outside the state that bears reasonably foreseeable consequences in the state—maintenance of the law suit does not offend traditional notions of fair play and substantial justice.' [citation omitted.]"[43] 688 F. 2d at 333.

Many state and federal authorities considering foreseeability and other factors have sustained jurisdiction under facts far less compelling than at bar.[44]

4. Jurisdiction Is More Compelling At Bar Than in Products Liability Cases.

Appellant's effort to limit the "effects principal" to products liability cases is unconvincing (AB 29-30). If

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[43]*See also, Vishay Intertechnology, Inc. v. Delta International Corporation, supra,* where the court concluded that telephonic and written communication initiated by defendant from California and sent into the forum, North Carolina, constituted tortious conduct within that state, subjecting the defendant to jurisdiction.

[44]*McGuire v. Brightman,* 79 Cal. App. 3d 776, 145 Cal. Rptr. 256 (1978); *Novel v. Garrison,* 294 F. Supp. 825 (N. D. Ill. 1969); *Pegler v. Ed Sullivan,* 6 Ariz. 338, 432 P. 2d 593 (1967) (mere knowledge that a show would be telecast in Arizona alone "made the action of Sullivan and Random House voluntary, purposeful, reasonable, forseeable, and calculated to have an effect in Arizona," sufficient to subject defendant Sullivan to jurisdiction); *Process Church of the Final Judgment v. Sanders,* 338 F. Supp. 1396 (N. D. Ill. E. D. 1972).

such cases "pushed due process to the very limits" (AB 29), then the facts presented at bar are more safely within its limitations. For we are not concerned with mere negligence untargeted for any particular state, but rather, intentional acts aimed with focused precision at California.

5. It Is Appropriate To Consider Convenience After Looking At Contacts.

Contrary to Appellants' assertion (AB 20-23) this Court's authorities have indicated the propriety of considering convenience. *See, International Shoe v. Washington, supra* at 317.[45] This is of course not to say that convenience is a substitute for the due process mandated contacts, but it is certainly a proper consideration in a close case.

The California Court of Appeal considered convenience only after first determining that consistent with the effects test, ample constitutionally mandated minimum contacts existed. (J.A. 117-118).

Once convenience is considered, the propriety of the lower court's decision is clear. Both Appellants, as members of the media, utilize modern communications and transportation as an integral part of their activity. To require use of those same means of communication and transportation to litigate in a place where they knew they were targeting a deleterious story provides no inconvenience or unfairness.

Furthermore, since the Enquirer has not disputed jurisdiction, as a practical matter, Appellants, who are represented by the same counsel, are likely to be represented by

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[45] "An estimate of the inconveniences which would result . . . from a trial away from its 'home' or principal place of business is relevant. . . ."

the Enquirer counsel at no expense to themselves.[46] Preventing jurisdiction over Appellants will only lead to multiple litigation based upon the same article; the Enquirer is being sued in California, Appellants would have to be sued elsewhere. Most of the witnesses with respect to the truth or falsity of the story are in California, the injury to Appellee and its most obvious consequences occurred in California and its proof would likely be through use of California residents.

Finally, it is difficult to posit inconvenience to Appellants when Calder defended the *Carol Burnett v. National Enquirer, Inc. et al.* lawsuit there, and was in attendance during the entire trial thereof, and South has been to California on so many occasions that he even thought of moving there.

Under all these circumstances, inconvenience to Appellants is miniscule.

Finally, as discussed in Appellee's Motion to Dismiss or in the Alternative Affirm, pp. 16-17, which are incorporated herein by reference, under applicable authorities even if this Court were to accept a special First Amendment jurisdictional preference, Appellants would still be subject to jurisdiction consistent with the Constitution.

C. APPELLANTS MAY NOT INSULATE THEMSELVES FROM JURISDICTION SIMPLY BECAUSE THEIR INTENTIONAL, TORTIOUS CONDUCT OCCURRED IN THE COURSE OF CORPORATE EMPLOYMENT.

Seeking yet another way to ignore the fact of their own intentional wrongful conduct, Appellants contend that

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[46] Sponsler, *Jurisdiction Over The Corporate Agent: The Fiduciary Shield*, 35 WASH. & LEE L. REV. 349, 364-365 (1978).

due process mandates that "jurisdiction over a foreign corporation does not carry with it jurisdiction over the corporation's employees," (AB 25-26). However, this misstates the issue presented for Appellee does not claim that jurisdiction over the Enquirer automatically carries with it jurisdiction over all its employees.

The issue correctly stated is whether the due process clause automatically insulates a corporate employee from jurisdiction for tortious acts he himself performs and contacts he himself establishes with a forum, simply because those contacts occurred while working for a corporate employer.

The foregoing distinction reflects the significant difference between subjecting the Enquirer's night janitor to jurisdiction in California for the subject article simply because the Enquirer is subject to jurisdiction and subjecting the reporter and the president and editor, primary participants in alleged wrongdoing, to jurisdiction for their own actual participation in and control over the article.

1. Only If A Fiduciary Shield Is Mandated By Due Process Is Reversal Appropriate.

This Court should reverse the California Court of Appeal if, and only if, it determines that the so-called "fiduciary shield" is mandated by due process. If it is not so mandated but is simply a matter of discretionary state judicial gloss to their long-arm statutes, the clearly better interpretation, than the California Court of Appeal's decision not to adopt the fiduciary shield is properly within that state's power.

2. The Fiduciary Shield Concept Having Arisen And Been Perpetuated By Confusion Should Not Be Further Elevated To Constitutional Significance.

The "fiduciary shield doctrine having come into existence through misunderstanding and having thrived on

lack of articulation and analysis, should be allowed to fade away in the course of more reasoned application of established principles." Sponsler, *Jurisdiction Over the Corporate Agent: The Fiduciary Shield*, 35 WASH. & LEE L. REV. 349, 365 (1978).

In the only reasoned and critical analysis of the "fiduciary shield doctrine," Professor Sponsler observed that:

> "The analyses by the courts in the cases in which this 'fiduciary shield' theory has been discussed have been generally deficient in treating alike greatly divergent fact patterns which the cases have presented and *in failing to differentiate between the issue of substantive liability and the issue of jurisdiction* . . . (at 350)[47]

Professor Sponsler's careful analysis of the history of the fiduciary shield doctrine led him to conclude:

> "Making the corporate agent amenable to the court's jurisdiction would seldom involve any hardship to the agent greater than that implicit in being sued in any state. . . ." (at p. 364).
>
> " . . . *The conclusion that the court has jurisdiction over the corporation should not mean that it has jurisdiction over the individual defendant, however, the fact that the individual defendant's actions otherwise meet the terms of the long-arm statute should not be affected by the fact that he has acted in a corporate capacity.* (Emphasis added.) (at p. 365).

The proper approach to jurisdiction over corporate agents is to utilize the same jurisdictional principles applied in any other situation rather than resort to blanket immunity.[48]

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[47] One such case, generally cited for the establishment of the fiduciary shield theory, is *Boas & Associates v. Vernier*, 22 A. D. 2d 561, 257 N. Y. S. 2d 487 (1965).

[48] "Ignoring any notion that acting in a corporate capacity somehow provides the defendant with a jurisdictional shield eliminates unfairness to the plaintiff and permits a systematic application of jurisdictional principles as they are applied in other contexts." Sponsler, 35 WASH. & LEE L. REV. 349 at p. [illegible]

Ignoring the claims of fiduciary shield will allow proper consideration of this matter pursuant to the precepts of *International Shoe*, without resolving it by Appellants' resort to magical and unwarranted incantations of immunity.

3. Most Authorities Have Found The "Fiduciary Shield Doctrine" Inapplicable To Corporate Employees Who Participate In The Commission Of A Tort.

In *In Re Mid-Atlantic Toyota Anti-Trust Litigation*, 525 F. Supp. 1265 (D. C. Md. 1981) the district court rejected a claim that an individual's participation as a corporate officer in meetings concerning a price-fixing conspiracy was subject to "fiduciary shield" protection from jurisdiction, stating:

> "The 'fiduciary shield' does not apply where a corporate officer has *allegedly* committed a personal or business tort within the state. . . . In such a situation, there would be personal jurisdiction over the defendant in his individual capacity, under the section of the long arm statute providing for personal jurisdiction over a person who commits a tortious act within the state." (Emphasis added.) 525 F. Supp at 1270-1271.

The *Mid-Atlantic Toyota* case reflects the overwhelming authority to the effect that participation in tortious conduct by a corporate officer or employee may not be immunized by the fiduciary shield doctrine. *See, Wilbourn v. Mostek Corp.*, 537 F. Supp. 302 (D. Colo. 1982), *All American Car Wash v. National Pride Equipment*, 550 F. Supp. 166 (W. D. Okla. 1981).[49] *Donner v. Tams-*

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[49] "Corporate officers are personally liable for alleged tortious conduct of the corporation if they personally took part in the commission of the tort. . . . Contacts sufficient to support personal liability of a corporate officer are sufficient to support *in personam* jurisdiction [Citation omitted]" 550 F. Supp. at 169.

Witmark Music Library, Inc., 480 F. Supp. 1229 (E. D. Pa. 1979); *Barrett v. Bryant*, 290 N. W. 2d 917, 921 (Ia. 1980). *See also, Kinstler v. Saturday Evening Post Co.*, 507 F. Supp. 113 (S. D. N. Y. 1981) a libel action, where after giving lip service to a "fiduciary shield" doctrine, the Court described it as "a flexible doctrine designed to achieve the ends of justice and should not be woodenly applied" (507 F. Supp. at 115), and failed to apply it determining simply that "fair play and substantial justice" were satisfied.

It would be most anomalous for state law to subject a participant in a libel to liability while at the same time establishing a state created jurisdictional immunity making it easier to evade answering for those very acts. *Donner v. Tams-Witmark Music Library, Inc., supra*, at p. 1233. For further criticism of the fiduciary shield see *Lighting Systems, Inc. v. International Merchandising, Inc.*, 464 F. Supp. 601 (W. D. Pa. 1979); *Leshko v. Don-Oliver, Inc.*, 86 FRD 343 (M. D. Pa. 1979).

4. Those States Which Have Adopted A Fiduciary Shield Doctrine Have Generally Done So As A Matter Of State Policy Not Constitutional Mandate.

Though Appellants rely heavily on a line of federal district court cases for its claim of jurisdictional immunity for corporate employees, even a cursory review of those cases suggests their lack of applicability to this matter.

Most emanate from New York, or from jurisdictions containing long-arm statutes significantly narrower than California's. Appellants rely on *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1347 (E. D. N. Y. 1981), *Grove Press, Inc. v. CIA*, 483 F. Supp. 132, 135 (S. D. N. Y. 1980), and *Marine Midland Bank v. Miller*, 664 F. 2d 899, 903 (2d Cir. 1981) which articulate a "fiduciary shield"

doctrine shielding officers and employees from jurisdiction based upon acts which they performed in their corporate capacity. However, as stated in *Marine Midland Bank v. Miller, supra,* and as logic compels, this doctrine:

> *"is not a constitutional principle, but is rather a doctrine based on judicial inference as to the intended scope of the long-arm statute* [of New York]" 664 F. 2d at 902, fn. 3 (emphasis added).

Appellants' other authorities allegedly supporting an asserted fiduciary shield are largely inapposite.[50]

Those authorities which Appellants suggest establish the fiduciary shield doctrine as a matter of due process, generally deal with an entirely different situation than presented at bar. They seek to subject corporate officers and employees to jurisdiction based exclusively upon existence of jurisdiction over their corporate employer, without reference to the individual's role in those contacts.

So, for example, in *State ex rel. Miller v. Internal Energy Management Corp.,* 324 N. W. 2d 707 (Ia. 1982),

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[50]*Idaho Potato Commission v. Washington Potato Commission,* 410 F. Supp. 171 (D. Idaho 1975) relies primarily on the New York authorities; *Weller v. Cromwell Oil Co.,* 504 F. 2d 927 (6th Cir. 1974) dealt with construing Ohio's long-arm statute rather than constitutional interpretation ("in this appeal) we construe Ohio's long-arm statute . . . (at p. 928) and "[W]e are not willing to extend the Ohio long-arm statute to cover this case." (at p. 931); *Escude Cruz v. Ortho Pharmaceutical Corp.,* 619 F. 2d 902 (1st Cir. 1980); dealt with a Puerto Rican long-arm statute significantly narrower than California's; *Wilshire Oil Co. v. Riffe,* 409 F. 2d 1277 (10th Cir. 1969) a suit by a corporation *against its own former employees* related to their acts when employed, relied on New York authority, dealt with a narrower long-arm than California and was decided on the grounds that the contacts with the form were weakly related to the cause of action; *Hurletron Whittier, Inc. v. Barda,* 82 Ill. App. 3d 443, 402 N. E. 2d 840 (1980) dealt with a suit by a corporation against its own officer and the court concluded that "the tenuous nature of defendant's business contacts with Illinois will not support the exercise of jurisdiction." at p. 843.

the Iowa Supreme Court concluded that it would apply the fiduciary shield "doctrine as a due process limitation on the exercise of jurisdiction." (at p. 711). However, in reaching its conclusion, the court made clear that the factual situation it was considering was quite different than that presented here. It stated:

> "[W]hether the minimum contacts established by [the corporate employer] *can be attributed to them* on an individual basis." (Emphasis in original) 324 N. W. 2d at 711.
>
> "This appeal thus turns on whether the fiduciary shield doctrine is applicable to insulate defendants from jurisdiction that Iowa courts have obtained over their corporate employer." 324 N. W. 2d at 711.
>
> "[G]enerally a non-resident corporate agent is not individually subject to a court's jurisdiction *on the basis of jurisdiction of the corporation itself.*" (Emphasis added) 324 N. W. 2d at 711.

Finally, the Iowa Supreme Court in *Miller* cited with approval, its own ruling just two years earlier in *Barrett v. Bryant, supra,* at 921 finding the fiduciary shield inapplicable where the corporate employee was engaged in tortious conduct.[51]

At most, *Miller* supports the conclusion that holding an employee subject to jurisdiction solely because of his *relationship* to his corporate employer, without regard to his involvement with the tortious conduct and the forum state, may raise due process problems.[52]

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[51] "However, that doctrine [fiduciary shield] has no application here, since jurisdiction over the individual defendants is not predicated on jurisdiction over [their corporate employer] but upon their own activities. . . . '[T]he fact that the individual defendant's actions otherwise meet the terms of the long-arm statute should not be affected by the fact that he has acted in a corporate capacity." (290 N. W. 2d at 921).

[52] 4 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1069 (Supp. 1982) reiterates this same notion of fiduciary shield:

(Continued on next page)

At bar, as in *Barrett* but unlike *Miller*, Appellants were held subject to jurisdiction based upon their own involvement in the tortious conduct, not simply because their employer, the Enquirer, was so subject.[53]

Appellants' reliance on Ninth Circuit authority of *Forsythe v. Overmeyer*, 576 F. 2d 779 (9th Cir. 1978) *cert. denied*, 329 U. S. 864 (1978) and *Chem Lab Products, Inc. v. Stepanek, supra*, is similarly misplaced.

The language in *Forsythe* suggesting the proposition for which Appellants cite it, is mere dictum. Further, *Forsythe* dealt with a commercial transaction not intentionally tortious conduct. Finally, in support of the proposition under discussion, *Forsythe* relies only upon the one-half (½) page opinion of *Chem Lab Products, Inc. v. Stepanek, supra*, which case found no "personal acts" with California, making clear that "personal acts" meant contact with California on behalf of a corporation or *otherwise*. In other words, it was only by virtue of the corporations being subject to jurisdiction that jurisdiction over the individual was sought.

Appellants, being significant participants in the publication of the libelous article, may be subject to liability for its publication. Prosser, *Handbook of the Law of Tort*, § 113 (4th Ed. 1971)[54]; 50 Am. Jur. 2d, *Libel and Slander*

(Continued from previous page)

"Thus, jurisdiction over individual officers and employees of a corporation *may not be predicated on the court's jurisdiction over the corporation itself.* . . ."

[53]*Chem Lab Products, Inc. v. Stepanek*, 554 F. 2d 371, 372 (9th Cir. 1977) also deals with asserting jurisdiction over a corporate officer because of his relationship with the corporation though he had no involvement in the conduct subject to suit. Thus, as in *Miller*, the due process implications are understandable.

[54]"Likewise everyone who takes part in the publication, as in the case of the owner, editor, printer, vendor, or even carrier of a newspaper is charged with publication. . . ."

§ 321, and may also be subject to jurisdiction based thereon.

5. Reasonableness And Traditional Notions Of Fair Play And Substantial Justice Suggest No Due Process Mandate For A Fiduciary Shield.

International Shoe Co. v. Washington, supra, sets forth the due process standard for jurisdiction, as stated above. Refusing to immunize tortious conduct, and especially intentional tortious conduct, simply because it was accomplished while the perpetrator happened to be employed by a corporation, would in no way infringe "traditional notions of fair play and substantial justice." For, if it does not offend such notions to subject knowing participants in wrongful conduct to jurisdiction in that state, it is no more offensive to subject those defendants to jurisdiction for the very same acts simply because they were accomplished while in the corporate employ.

To conclude otherwise would render the corporate form a safe haven for those who would engage in intentionally tortious conduct. The corporate form could be created to insulate wrongdoers thus allowing anomolous results to follow.[15] It would be most surprising if constitutional significance attached to the fact that wrongdoing was accomplished in the corporate rather than individual capacity. For, "[n]o man ought to have a right to defame others under colour of a performance of the duties of his office." 25 STORY, COMMENTARIES ON THE CONSTITUTION, § 863, p. 329 (1933).

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[15]For example, consider the situation where an out-of-state attorney coming to California to take a deposition, rents a car and on his way to a deposition, by reason of his negligence, is in an automobile accident. Under appellants' theory whether he would be subject to California jurisdiction for a lawsuit resulting from the accident would turn upon whether he was a sole practitioner operating individually or had a professional corporation for which he was employed.

D. CALIFORNIA'S ASSERTION OF JURISDICTION WOULD HAVE NO OBJECTIONABLE EFFECT ON INTERSTATE COMMERCE.

Appellants' Commerce Clause argument has been properly relegated by them to a few short pages near the end of their brief. For this argument is meritless in light of pertinent authority and the facts which Appellants themselves have asserted.

It has been stated that:

> "[W]here the defendant contends that the maintenance of plaintiff's suit in the state would constitute an undue burden on interstate commerce, the burden is on the defendant to establish the truth of such contention." 15A AM. JUR. 2d, *Commerce*, § 98, p. 466 (1976); *Kirkland v. Atchison, T. & S. F. R. Co.*, 104 Ga. 200, 121 S. E. 2d 411, 416 (1961).

Yet Appellants make no adequate showing of inordinate burden on interstate commerce. In fact, they assert that they have no stake in the sales activity of their employer and no control over it. (AB 27). In light of their self-proclaimed lack of involvement in the commerce of their employer, it is impossible to find any additional burden on interstate commerce by subjecting them to jurisdiction.

Appellants cite *Michigan C. R. R. v. Mix*, 278 U. S. 492 (1929); *Atchison, T. & S. F. Ry. v. Wells*, 265 U. S. 101 (1924); *Davis v. Farmers Co-operative Equity Co.*, 262 U. S. 312 (1923); *Denver & R. G. W. R. R. v. Terte*, 284 U. S. 284 (1932) in support of their claim that "state jurisdictional statutes as applied to interstate enterprises were rejected." (AB 46).

What Appellants ignore are the most salient features of those cases which distinguish them from the facts here presented; the forum was not the true residence of the

plaintiff[56] (in *Mix* plaintiff moved to the forum after the claim arose for purposes related to the initiation of the lawsuit) and all dealt with efforts to subject *common carriers* to jurisdiction. This later fact may explain the statement at 15A Am. Jur. 2d, *Commerce*, § 98 (1976) that:

> "Nevertheless, courts may be deprived of jurisdiction which they would otherwise possess by the fact that the carrying on of litigation there imposes a serious burden on *an agency of interstate commerce.*" (Emphasis added.)

See also, Louisell and Hazard, Pleading and Procedure, p. 280, (4th ed. 1979), indicating that "the Commerce Clause may do so [impose some special limit on territorial jurisdiction] *in cases involving interstate carriers.*" (Emphasis added.)

In *International Harvester Co. v. Ky.*, 234 U.S. 579, 587 (1914) this court unequivocably rejected the contention that "so long as a foreign corporation engages in interstate commerce only, it is immune from the service of process under the laws of the state in which it is carrying on such business."

At bar, there is no direct burden on interstate commerce and at most only an inconsequential affect thereon, which has been found permissible. *S. C. Hwy. Dept. v. Barnwell*, 303 U.S. 177, 184-185 (1937).

Appellants' other authorities are equally unavailing. *Nippert v. City of Richmond*, 327 U.S. 416 (1946) a "drummer case," was not even a challenge to a state's assertion of jurisdiction. It was a commerce clause challenge to a tax on persons engaging in the business of solicitation. Such tax was struck down because:

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[56] *International Milling Co. v. Columbia Transport Co.*, 292 U.S. at 520, distinguished these cases on this very basis stating:

> "Residence, however, even though not controlling is of high significance."

> "Read in their proper historical setting these cases may be said to support the view that this kind of *a tax is likely to be used 'as an instrument of discrimination against interstate or foreign commerce.'*" 327 U. S. at 424. (Emphasis added.) *See also,* 327 U. S. at 434.

Those cases may also reflect the particular sensitivity of interstate commerce to discriminatory taxation for "the power to tax involves the power to destroy; . . ." *McCulloch v. Maryland,* 4 Wheat. 316, 431 (1819). No exertion of taxing power nor discriminatory actions are involved at bar.

Froning & Deppe, Inc. v. Continental Illinois Bank & Trust Co., 695 F. 2d 289 (7th Cir. 1982), cited by Appellant is also inapposite, for it is a due process case not even mentioning the Commerce Clause.

Also inapposite is *Erlanger v. Cohoes Fibre Mills,* 239 F. 2d 502 (4th Cir. 1956), a breach of contract case where the court indicated that the parties could have agreed to jurisdiction in their contract and chose not to.

Finally, no case cited by Appellants dealt with the allegedly intentional tortious conduct aimed at the forum, which is presented here.

E. KULKO V. SUPERIOR COURT, SUPRA, CONTROLS THE QUESTION OF THIS COURT'S JURISDICTION.

The case of *Kulko v. Superior Court, supra* at 90 n. 4, specifically and unequivocally stated with respect to a challenge to the application of CALIFORNIA CODE OF CIVIL PROCEDURE § 410.10, the same statute involved here:

> ". . . [T]his case was improperly brought to this Court as an appeal, since no state statute was 'drawn in question . . . on the ground of its being repugnant to the Constitution, treaties or laws of the United States.' 28 U. S. C. § 1257 (2). The jurisdictional statute construed by the California Supreme Court provides that the State's jurisdiction is as broad as the

Constitution permits. See, n. 3, *supra*. Appellant did not argue below that this statute was unconstitutional but instead argued that the Due Process Clause of the Fourteenth Amendment precluded the exercise of *in personam* jurisdiction over him. The opinion below does not purport to determine the constitutionality of the California jurisdictional statute. Rather, the question decided was whether the Constitution itself would permit the assertion of jurisdiction."

Appellants suggest that the key distinction between *Kulko* and the facts at bar is that here Appellants uttered the magic words in the court below, that § 410.10 as applied was unconstitutional (AB 50). However, it is sophistry to believe that this court's jurisdiction with respect to the same state code section would turn on the happenstance of the words used in asserting its claims in the lower courts. For here, regardless of what words were used, the analysis and review by the courts below were identical to that in *Kulko*. "The question decided was whether the Constitution itself would permit the assertion of jurisdiction." Thus, this matter is not within this Court's appellate jurisdiction but should be considered merely a Petition for Certiorari.

IV. CONCLUSION

For the reasons stated, the judgment of the California Court of Appeal should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IAIN CALDER and JOHN SOUTH,
Appellants,

v.

SHIRLEY JONES,
Appellee.

On Appeal from the California Court of Appeal, Second Appellate District

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1401

IAIN CALDER and JOHN SOUTH,
Appellants,

v.

SHIRLEY JONES,
Appellee.

On Appeal from the California Court of Appeal, Second Appellate District

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REPLY BRIEF FOR APPELLANTS

I. THIS CASE IS ABOUT INDIVIDUAL EMPLOYEES.

There is a misconception running throughout Appellee's brief as to what this case is about. This is not an instance of a publishing company resisting jurisdiction in a state in which it has distributed copies. *Cf. Keeton* v. *Hustler Magazine, Inc.*, No. 82-485. The publisher here consented to jurisdiction in California. Contrary to what Appellee says, Appellants are not arguing for "creation of a diplomatic immunity or jurisdictional privilege," nor is this an instance of "[t]he media's desire to avoid facing the music." Brief for Appellee at 10, 12. The Na-

tional Enquirer consented to jurisdiction.[1] It is actively defending the case.[2]

The issue in this case is whether *individual employees* can be forced to defend *themselves personally* in a distant forum, when the plaintiff already can obtain a complete remedy against the publisher. The issue is not whether the National Enquirer had sufficient contacts with California to support personal jurisdiction. The issue is whether individual employees did.

The damages sought by Appellee here are for publication and distribution of an allegedly libelous article. J.A. 7-10. Appellants did not publish or distribute the article; their employer, the National Enquirer, Inc., did. It is their employer which realizes any profits from publishing activities.

All that Appellants claim here is the established right of an individual defendant to have jurisdiction analyzed according to the standards of federalism and fairness

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[1] Appellee's reference to the Chief Justice's concurring opinion in *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978), does not support Appellee's argument. The Chief Justice there wrote that the Press Clause of the First Amendment, as contrasted with the Speech Clause, should not be read to give unique rights to institutional media corporations, as opposed to individuals. In the present case appellants are individuals, not a publisher, and no special claims are made uniquely under the Press Clause. Moreover, the Chief Justice recognized that in particular situations the First Amendment may alter the calculus of rights: "It may be that a nonmedia corporation, because of its nature, is subject to more limitations in political expression than a media corporation whose very existence is aimed at political expression." 435 U.S. at 797 n.1 (Burger, C. J., concurring).

[2] It is not at all clear that mere circulation of newspapers in a state through an independent distributor suffices to establish extraterritorial jurisdiction over a publishing company. See, *e.g.*, *Breckinridge* v. *Time, Inc.*, 253 Miss. 835, 179 So.2d 781 (1965); *cf. New York Times Co.* v. *Sullivan*, 376 U.S. 254, 264 n.4 (1964). But because the National Enquirer consented to jurisdiction and entered a general appearance, that is not an issue in this case.

and contacts *of that defendant* that the Due Process Clause requires. That analysis includes giving weight to important substantive policies, see, *e.g.*, *Kulko* v. *Superior Court*, 436 U.S. 84 (1978), and those important substantive policies most certainly do not exclude the First Amendment.[3] Jurisdictional analysis, this Court has held, must give due regard to

> "the shared interest of the several States in furthering fundamental substantive social policies." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980).

II. NONE OF APPELLEE'S THREE THEORIES FOR JURISDICTION IS SOUND.

This case boils down to three proposed theories on which Appellee claims extraterritorial jurisdiction. None has ever been applied by this Court to permit extraterritorial jurisdiction in a case like the present one, and none should be.

1. Appellee has proposed only one theory to support personal jurisdiction of the California court over Calder. All that Calder did with respect to the preparation of the article complained of was approve an evaluation and read the story in final proofs, the same way he normally reads everything printed in each week's edition. J.A. 17, 27-28. Appellee's brief concedes that "Calder . . . admittedly will be subject to jurisdiction only if this Court accepts the 'effects principle' . . . ." Brief for Appellee at 26.

To the extent that there is such a thing as an "effects principle," it is heavily qualified, it has never been

---

[3] Similarly, in the discovery context a court "in supervising discovery in a libel suit by a public figure . . . has a duty to consider First Amendment interests as well as the private interests of the plaintiff." *Herbert* v. *Lando*, 441 U.S. 153, 178 (1979) (Powell, J., concurring).

adopted by this Court, and it has been explicitly rejected by this Court when applied mechanically. *Kulko v. Superior Court*, 436 U.S. 84, 96 (1978).

As the only authority for asserting extraterritorial jurisdiction over Calder in these circumstances, Appellee relies on § 37 of the *Restatement (2d), Conflict of Laws*, and a number of "effects" cases having varying facts, none of them involving First Amendment claims. But this Court has already rejected such an unqualified assertion of automatic jurisdiction. In *Kulko* v. *Superior Court*, *supra*, this Court emphasized that "it is apparent that the California Supreme Court's reliance on Appellant's having caused an 'effect' in California was misplaced." 436 U.S. at 96. This Court went on to discuss § 37 of the *Restatement*, noting that "this provision is not binding on this Court," and that even by its own terms "the Restatement recognizes that there might be circumstances that would render 'unreasonable' the assertion of jurisdiction over the nonresident defendant." *Ibid.* See also *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). And indeed, the *Restatement* itself has stopped short of endorsing "effects" as the formula when First Amendment considerations are present:

> "**Caveat:**
>
> "The Institute expresses no opinion whether in situations where the interests of the defendant are protected by the First and Fourteenth Amendments of the Constitution, it is necessary that a State have a more substantial basis for the exercise of judicial jurisdiction over a non-resident defendant than would otherwise be required.
>
> • • • •
>
> "d. *Comment on the Caveat*: An action for defamation is an example of an action which may affect interests of the defendant that are protected by the First and Fourteenth Amendments of the Constitution. For a State to have judicial jurisdiction over a non-resident defendant in actions of this sort, it may be that the defendant must have a closer relationship to the State, or have caused effects in the State of a

more substantial nature, than would otherwise be required." RESTATEMENT (2D), CONFLICT OF LAWS, at 156, 159 (1971).

See also *Graciette* v. *Star Guidance, Inc.*, 66 F.R.D. 424 (S.D.N.Y. 1975); *Riverhouse Pub. Co.* v. *Porter*, 287 F.Supp. 1 (D.R.I. 1968).

2. An additional theory that Appellee advances for jurisdiction over South alone is that he visited California on several occasions (he estimated more than twenty times over the course of four years, J.A. 32; a friend of his estimated more than six but less than a dozen times per year, J.A. 66)—*all on business unrelated* to the story in question. There is no authority whatsoever to support a theory of jurisdiction on that basis. The case law is clear that there are two bases on which a corporation may become subject to suit in a distant state. One is by doing business in that state, which makes the corporation subject to suit there by anyone about anything—general jurisdiction. The other is by having sufficient contacts with the state to make the corporation subject to suit there *on a cause of action arising out of those contacts.* See *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945).

South was not an entity doing business in California; no one has ever claimed he was, and even the court below conceded that "it is clear that California does not have general jurisdiction over defendants Calder and South." J.A. 112. Therefore jurisdiction over him must be based, if at all, on any contacts he had with California *in connection with the article complained of.* And on that point, the record is undisputed that he never visited California even once in connection with this article.[4]

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[4] South's uncontradicted affidavit states that he did not. J.A. 19; see also J.A. 90-91. There is no evidence in the record from any source that says he did, and the burden of proof is on Appellee. *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). The trial court's speculation that he might have made one visit to investigate the article was not supported by any evidence and therefore can be disregarded. See Brief for Appellants at 16 n.19. The point is not crucial, because the trial court acknowledged that a single visit to investigate would not be enough to support jurisdiction, anyway. J.A. 94.

3. The final theory that Appellee proposes is that South's making long-distance telephone calls into California gives California jurisdiction. Such a theory if accepted, of course, would spell the end of all restrictions on jurisdiction now imposed by the Commerce Clause and the Due Process Clause. Lower courts have not hesitated to reject it. See, *e.g.*, *Thos. P. Gonzalez Corp.* v. *Consejo Nacional de Produccion*, 614 F.2d 1247, 1254 (9th Cir. 1980); *McBreen* v. *Beech Aircraft Corp.*, 543 F.2d 26 (7th Cir. 1976). To apply such a theory to newsgathering telephone calls would, besides violating due process and Commerce Clause protections, unduly inhibit First Amendment activity as well. The tort of libel consists in publication, not in gathering information, and indeed gathering information is a constitutionally protected activity. See, *e.g.*, *Virginia State Bd.* v. *Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748, 756-57 (1976); *Kleindienst* v. *Mandel*, 408 U.S. 753, 762-63 (1972).

The only authority which Appellee cites for a proposed new holding by this Court that newsgathering is tortious involved an unusual instance where the telephone call itself constituted the defamation, in a suit for business slander and antitrust violations, and also where the call was to law enforcement officials within the forum state invoking their assistance. *Brown* v. *Flowers Industries, Inc.*, 688 F.2d 328 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 1275 (1983); *contra*, *e.g.*, *McBreen* v. *Beech Aircraft Corp.*, *supra*; *Margoles* v. *Johns*, 333 F. Supp. 942 (D.D.C. 1971), *aff'd*, 483 F.2d 1212 (D.C. Cir. 1973); see also *Barnstone* v. *Congregation Am Echad*, 574 F.2d 286 (5th Cir. 1978). Whether or not that case was correctly decided, its facts are so different that it certainly is not pertinent here. Other cases Appellee cites involved suits on contracts or for various fraudulent or other improper business practices conducted by mail or wire, and generally involving companies rather than employees; they do not speak to the very different interests at stake in a defamation suit brought personally against the employees of a publisher.

4. Appellee's discussion of the fiduciary shield doctrine ignores some important distinctions. Courts have applied the fiduciary shield doctrine in two distinct situations. In one, the employee enters the state and commits a tort there while on his employer's business. In the other—as here—the employee never enters the state at all. Criticism of the doctrine has focused on the former situation, rather than the latter. It is only the latter that is involved here.

Appellee hypothesizes the case of an out-of-state attorney who negligently injures someone while visiting on a client's business. Brief for Appellee at 45 n.55. In such a case, the employee of course should be personally subject to the state's jurisdiction, on principles as old as *Hess* v. *Pawloski*, 274 U.S. 352 (1927); *cf. Wilbourn* v. *Mostek Corp.*, 537 F. Supp. 302 (D. Colo. 1982). But he should not be if, as here, he never enters the state at all and does whatever he does, as Appellee concedes, J.A. 8, in the course and scope of his employment.

5. Appellee argues that because the First Amendment provides some substantive defenses in libel actions, it should be ignored in jurisdictional analysis. But cases like *Kulko* v. *Superior Court*, 436 U.S. 84 (1978), show that that is a *non sequitur*. It also ignores practicality. If the very fact of having to defend a lawsuit in a foreign forum were not recognized as burdensome in itself, courts would not have to bother to apply the Fourteenth Amendment's due process guarantee to limit extraterritorial jurisdiction.[5]

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[5] Appellee's surprising assertion that "the additional cost of litigating in a distant forum is comparatively small when compared to the costs of litigating a libel matter at all," Brief for Appellee at 18, of course cuts two ways. If the additional cost is so negligible, Appellee might sue in Florida. But in fact, cost is only one advantage a plaintiff suing at home would have over a foreign editor or reporter. See, *e.g.*, Note, *Developments in the Law—State-Court*

Moreover, even apart from the added expense of having to defend in a distant state, the decision as to forum is more than academic for these two Florida residents. Choice of law rules are loose enough that a different forum may mean a different rule of law. California has applied its own law to interstate defamation cases brought by local plaintiffs, and under California law as recently interpreted, punitive damages for defamation may be awarded merely on a showing of "conscious disregard for the rights of others." *Burnett* v. *National Enquirer, Inc.*, 144 Cal. App. 3d 991, 1009, 193 Cal. Rptr. 206, 216 (1983). Florida law, however, does not permit punitive damages for libel unless the plaintiff proves "ill will, hostility, evil intention to defame and injure." *Montgomery* v. *Knox*, 23 Fla. 595, 606, 3 So. 211, 217 (1887). A Florida court might well apply its own law with respect to punitive damages, reasoning that that issue is procedural, *cf.* RESTATEMENT (2D), CONFLICT OF LAWS §§ 121 *et seq.*, or because punitive damages peculiarly implicate local public policy. See RESTATEMENT (2D), CONFLICT OF LAWS § 171, comment *d*; *cf. James* v. *Powell*, 19 N.Y.2d 249, 22 N.E.2d 741, 279 N.Y.S.2d 10 (1967). Whether a Florida court would apply California law even as to liability is uncertain, because the Supreme Court of Florida recently explicitly abandoned the rule of *lex loci delicti* for tort cases. *Bishop* v. *Florida Specialty Paint Co.*, 389 So.2d 999 (Fla. 1980).

Jurisdiction, 73 HARV. L. REV. 909, 911 (1960); *Michigan C.R.R.* v. *Mix*, 278 U.S. 492, 495 (1929).

Judge Bork writing for the U.S. Court of Appeals for the District of Columbia Circuit recently noted that libel suits because of "the risks and high costs of litigation may lead to undesirable forms of self-censorship" and "should be controlled so as to minimize their adverse impact upon press freedom." *McBride* v. *Merrell Dow and Pharmaceuticals, Inc.*, No. 82-1786 (D.C. Cir., Sept. 27, 1983), slip op. at 13.

III. APPELLEE'S BRIEF CONTAINS INACCURACIES.

1. Appellee's treatment of the record is troubling. For example, in the court below Appellee made much of the fact that Appellant South had telephoned Appellee's husband, Mr. Ingels, and read him a draft of the article; Appellee argued, and succeeded in persuading the court below, J.A. 116, that this long-distance telephone conversation with Ingels was an independent and sufficient basis for personal jurisdiction over South. However, Ingels no longer is a party to this case. 103 S. Ct. 2426 (1983). Yet Appellee continues to claim that that call is a basis for jurisdiction, see Brief for Appellee at 26—and now several times asserts or implies that South's conversation was *with Appellee.*

Thus after conceding on page 1 that the conversation was with Mr. Ingels (as Mr. Ingels admitted, J.A. 78, and as the courts below found, J.A. 94, 116), at page 2 Appellee's brief nevertheless refers to "South's telephone call *to Appellee.*" At page 24 it asserts that "South with Calder's presumed knowledge, *called Appellee* and her husband before publication, read the article . . . ." At page 26 it says that South "*telephoned Appellee* and her husband to read *them* the article before publication, thereafter wholly ignoring *their* protests of falsity." At page 3 it refers to "the above-described *telephone call to Appellee* and her husband." (Emphasis in all instances supplied.) Although we differ with Appellee's belief that that telephone call ever had any jurisdictional significance, these four misstatements of the record exceed the tolerable limit.

For another example, Appellee's brief states that "In conducting his 'investigation' of the story, he [South] had many telephone conversations with persons in California (J.A. 115) . . . ." Brief for Appellee at 3; see also *id.* at 26. But J.A. 115, which is cited as authority for the assertion in the brief, is not a citation to the evidence at all; it is a citation to the opinion of the court below. And

all that the court below there says is that South "gathered information appearing in the allegedly defamatory article in the course of at least one visit made by him to California and telephone calls which he made to the state." J.A. 115. The court did not say that he had "many" telephone conversations concerning the article.[6]

As another example, Appellee's brief states that it is "inferable" that Appellant Calder "discussed South's call approvingly with South and others both before and after it was made." Brief for Appellee at 2. There is no basis or evidence whatsoever for any such inference in the record, and there was no such finding by anyone. Again, we believe that the point is of no jurisdictional significance, but Appellee's representation certainly misstates the facts of record.[7]

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[6] On the same page of Appellee's brief, this Court is told that South had twenty to twenty-five conversations with John Robert Lucas, a source. Brief for Appellee at 3. What Appellee does not say is that these conversations were not indicated to be about this story. See J.A. 35-36. In fact, as is set forth with appropriate record citations in our opening brief, the record shows only four telephone calls to California by South that had to do with the article complained of. Brief for Appellants at 5. In addition, Lucas subsequently testified (after the ruling below) that he did have one long-distance telephone call with South concerning the article. See Appendix B to Brief for Appellants. (We believe it appropriate to have informed the Court of that additional call in which South participated, even though it was not in the Joint Appendix, lest we have understated the number of calls conceded to have occurred. Contrary to the vague assertion on page 4 of Appellee's brief, we are not aware of any other post-record "jurisdictionally significant information.")

[7] Appellee's statement of the facts of record also alleges, as if it were a part of this case, that "the published story also contained numerous defamatory statements about Mr. Ingels." Brief for Appellee at 1. However, in the trial court Appellee on April 28, 1983, filed a verified amended complaint that supersedes the one reproduced at J.A. 7-14 and *specifically excludes* any claim that the statements about Mr. Ingels were defamatory. A copy of that amended complaint has been lodged with the Clerk for the Court's

2. Appellee's treatment of the case law also does not always bear scrutiny. For example, Appellee's brief attempts to distinguish *McCabe* v. *Kevin Jenkins & Associates, Inc.*, 531 F. Supp. 648 (E.D. Pa. 1982), by describing that case as "turning on the narrower long-arm statute of Pennsylvania." Brief for Appellee at 22 n.24. No authority for that description is cited. Yet it could not be clearer that (1) the Pennsylvania statute is not "narrower," but rather is coextensive with due process;[8] and (2) *McCabe* was explicitly a constitutional holding. It is clear because the *McCabe* court took pains to say so:

> "Because the Pennsylvania statute extends jurisdiction to the fullest extent permitted under the Constitution, however, the only inquiry required is whether assertion of jurisdiction over KJAI is consistent with the due process standards set forth in *International Shoe Co.* v. *Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and its progeny. I therefore proceed immediately to the constitutional question." 531 F. Supp. at 649-50 (footnote omitted).

Appellee's latest misdescription of that case to this Court is the more troubling because when Appellee earlier made the identical mistaken assertion to this Court, we took the trouble to point out the error by quoting the language above. See Brief Opposing Motion To Dismiss or Affirm, at 3 n.1. Nevertheless, Appellee's brief now simply repeats the original assertion.

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information. *Cf. Fusari* v. *Steinberg*, 419 U.S. 379 (1975); *id.* at 390 (Burger, C.J., concurring). Like the original complaint, the amended complaint alleges both that Appellee's reputation always has remained good and that it has been damaged.

[8] The statute itself explicitly says so. See 42 PA. CONSOL. STAT. ANN. § 5322(b) (Purdon, 1981):

> "the jurisdiction of the tribunals of this Commonwealth shall extend to all persons . . . to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States."

In another instance, Appellee's brief asserts, at 19, that "the *Connor* case [*New York Times Co.* v. *Connor*, 365 F.2d 567 (5th Cir. 1966)] has itself been limited and qualified by subsequent Fifth Circuit opinions." That is an impossible reading of the Fifth Circuit position in light of *Edwards* v. *Associated Press*, 512 F.2d 258 (5th Cir. 1975), the most recent Fifth Circuit decision on this point. *Edwards* held that "when a court attempts to assess whether jurisdiction over a defendant is reasonable, First Amendment considerations are a significant factor to be weighed," and "we reaffirm the First Amendment protections we have woven into our prior *in personam* jurisdictional analysis . . . ." 512 F.2d at 266, 268. But even more odd is the fact that on the facing page of their brief, Appellee's counsel attempt to dismiss an unpalatable recent Eleventh Circuit holding by saying that "it considered itself bound by 'applicable law previously developed in the former Fifth Circuit.' " Brief for Appellee at 18 n.19, quoting *Cox Enterprises, Inc.* v. *Holt*, 678 F.2d 936, 937 (11th Cir. 1982). Thus Appellee on page 19 says that weighing First Amendment considerations is a practice the Fifth Circuit after 1966 "limited and qualified;" but on page 18 Appellee says that in 1982 in weighing the First Amendment, the Eleventh Circuit was merely following the established Fifth Circuit rule (which it was). Appellee cannot have it both ways.[9]

As a final example, Appellee in discussing the Commerce Clause says that *Froning & Deppe, Inc.* v. *Continental Illinois Bank & Trust Co.*, 695 F.2d 289 (7th Cir. 1982), "is also inapposite, for it is a due process case not even mentioning the Commerce Clause." Brief for Appellee at 48. *Froning & Deppe* did rest on due process. But what that case also says is:

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[9] In another instance, Appellee states that *Kinstler* v. *Saturday Evening Post Co.*, 507 F. Supp. 113 (S.D.N.Y. 1981), was "a libel action." Brief for Appellee at 41. *Kinstler* was not a libel action at all. It was a suit by an artist for unauthorized publication of a copyrighted portrait.

> "Most importantly, however, as the district court found, maintenance of personal jurisdiction over South Story in this case would positively *hinder* the underlying policies of the several states which favor the free flow of commerce and of interstate banking transactions in particular. Upholding jurisdiction here on either Valley National's 'foreseeability' theory or its 'benefit and protection' theory would have the result of subjecting a bank to suit in any state from which a check cashed by one of its customers might originate, and would more broadly potentially subject anyone who did business with a large national corporation to suit in any state in which the corporation did business, irrespective of the individual's contacts with that state. Plainly, such a result would wreak havoc upon the orderly conduct of interstate business.
>
> "Valley National attempts to understate the chilling effect of a ruling in its favor." 695 F.2d at 294 (emphasis in original).

And Appellee's attempt on the same page to distinguish the leading Commerce Clause case of *Erlanger Mills, Inc.* v. *Cohoes Fibre Mills, Inc.*, 239 F.2d 502 (4th Cir. 1956), Brief for Appellee at 48, is simply incomprehensible.[10]

3. Appellees' treatment of the secondary authorities is selective at best. Appellee notes that Judge Weinstein and Professor Leflar endorsed the recognition of First Amendment considerations prior to *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). Brief for Appellee at 19. Appellee cites three student notes from 1967 that took a view contrary to that of those writers. *Id.* at 21 n. 23. But Appellee makes no response to the leading post-*New York Times* law review discussion of this point,

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[10] The adverse impact of interference with commerce from jurisdictional overreaching is underscored by the Solicitor General in the pending case of *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, No. 82-1127. See Brief for the United States as Amicus Curiae, *passim*.

cited in Appellants' opening brief, which observed, referring specifically to those student notes:

> "Criticism of the kind described is unlikely to serve its intended purpose of promoting more 'principled' decision-making; it is more likely to have quite the opposite effect. Failure to give explicit recognition to the impact of a decision on substantive interests tends to hinder our understanding, to promote the use of fiction, and to complicate the task of the advocate seeking to assist the court in making direct confrontation with the issues." Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227, 243 (1967).

• • • •

Personal jurisdiction is one of those peculiar areas in which only this Court is in a reliable position to keep state claims of power from reaching too far beyond their respective borders. The normal restraints provided by the electoral process are of limited avail when the interests threatened are those of nonresidents and of the system as a whole, and when the claims of local plaintiffs seem appealing.[11] *Cf. Nippert v. City of Richmond*, 327 U.S. 416, 434 (1946); P. FREUND, *Umpiring the Federal System*, in THE SUPREME COURT OF THE UNITED STATES 102-103 (1961); Ottonello, *California's Convenience-Oriented Approach to Personal Jurisdiction: A Critical Review*, 13 LINCOLN L. REV. 21 (1982). As in *World-Wide Volkswagen Corp. Woodson*, 444 U.S. 286, 293-94 (1980), this Court is asked to apply the policies of the national Constitution once again.

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[11] The trial court recognized that "the principal practical effect of holding the individual defendants as parties to this lawsuit would be to facilitate plaintiffs' claims for punitive damages against the individuals," J.A. 96-97—in other words, to impose punishment on persons from another state.

CONCLUSION

For the reasons stated herein and in Appellants' opening brief, the judgment should be reversed.

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No. 82-1401

IN THE

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Appellants,

vs.

SHIRLEY JONES,

Appellee.

On Appeal from the California Court of Appeal, Second Appellate District

MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*, AND BRIEF OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. AS *AMICUS CURIAE*

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MOTION OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Association of American Publishers, Inc. ("AAP") hereby seeks leave of this Court to file a brief as *amicus curiae*, pursuant to Rule 36 of the Rules of this Court, in support of appellants Iain Calder and John South, urging reversal of the decision of the court below insofar as that decision held First Amendment considerations to be irrele-

vant to the determination of *in personam* jurisdiction questions involving employees of a publisher charged with libelous activity. This motion is necessitated by the refusal of counsel for appellee, Shirley Jones, to grant permission to file such brief. AAP's brief, conditionally filed herewith, is annexed to this motion.

Interest of the *Amicus*

The AAP is the major national trade association for book publishers in the United States. Its more than 300 members include commercial and non-profit book publishers, both large and small, university presses and scholarly associations. AAP's member publishers market their books to a wide variety of customers (among them bookstores, schools, universities and libraries) in a variety of markets—both national and regional— across the country. Despite this diversity, all of AAP's members share a firm commitment to the First Amendment, which, as this Court has well stated, seeks to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States,* 354 U.S. 476, 484 (1957).

AAP's members all too often feel the sting of defamation lawsuits—actions which, as this Court also has recognized, frequently are brought, not to vindicate injured reputation, but to punish unpopular expression. *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 349-50 (1974). In such circumstances, libel suits threaten to achieve the antithesis of that which the Constitution protects and this Court has sought to preserve and encourage: ". . . a profound national com-

mitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

Such libel actions continue to exact a heavy toll on the publishing process, notwithstanding the welcome protections afforded publishers by the constitutional safeguards developed in *New York Times* and its progeny. Publishers, along with their authors, editors, and other creative collaborators, are thus, with alarming frequency:

— subjected to lawsuits seeking enormous and potentially ruinous actual and punitive damages awards;

— required to defend such lawsuits through motions to dismiss, vigorous and intrusive discovery, and, in many cases, summary judgment motions, trials and inevitable appeals;

—diverted in their energies and financial resources from the business of publishing; and

— compelled to justify, in the face of such attacks, the publication of hard-hitting and controversial commentary in which it is their constitutional privilege to engage, but for which they may pay dearly.

The rationale of the decision below—reading the First Amendment out of the jurisdictional inquiry in a libel suit*—will, if affirmed by this Court, only serve further to

* While AAP recognizes that the jurisdictional issue before the court below involved solely the president of the publisher and the author of the allegedly libelous article, and not the publisher itself, the sweeping rationale of the decision—and its square rejection of authority dealing with the First Amendment rights of both publishers and their employees—threaten directly the First Amendment rights of AAP's member publishers.

encourage libel actions that would defeat the carefully crafted constitutional protections afforded the publishing process by this Court, and to inhibit publishers and those engaged with them in the publishing process from fulfilling their constitutional duty of "shed[ding] . . . light on the public and business affairs of the nation. . . . *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936).

In effectively equating publishers, their authors, editors and employees, for purposes of determining *in personam* jurisdiction in the libel setting, with manufacturers of automobiles, appliances and cans of food, and mechanistically applying this Court's due process standards—as developed in such different settings—without regard to the countervailing constitutional interests at stake, the court below totally failed to exhibit any sensitivity to the crucial role of the press in our society or to the likely consequences of its decision on the vitality of that role. Much as this Court has developed constitutional protections for the press dealing with standards of liability and damage awards in libel suits, AAP submits that this Court should likewise now rule that a state's jurisdictional inquiry, in connection with a libel suit against an out-of-state publisher and/or its authors or employees, must exhibit special solicitude to the First and Fourteenth Amendments, *i.e.*, to the likely impact of the outcome of that inquiry on the workings of a free press.

In the annexed brief we discuss from the perspective of book publishers—small and large, regional and national—the untoward implications for the publishing process of the rule adopted by the court below. We therefore respect-

fully request that AAP's motion for leave to file the annexed brief be granted.

Respectfully submitted,

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No. 82-1401

IN THE

Supreme Court of the United States

October Term, 1982

IAIN CALDER and JOHN SOUTH,

Appellants,

vs.

SHIRLEY JONES,

Appellee.

On Appeal from the California Court of Appeal,
Second Appellate District

BRIEF OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. AS *AMICUS CURIAE*

Interest of the *Amicus*

The interest of the *amicus curiae* is set forth in the preceding motion papers.

Statement of the Case

This action was commenced in the Superior Court of the State of California, Los Angeles County, by Shirley Jones and Marty Ingels, entertainers who reside in California, as a result of an article which appeared in the October 9, 1979 issue of the National Enquirer. The article was written by John South, who is employed by the Enquirer, and its preparation was generally overseen by Iain Calder, the Enquirer's president and editor. Both Calder and South reside and work in the State of Florida, where the Enquirer has its headquarters. Calder had no contacts with the State of California in connection with the publication of the article other than the fact that he knew that it would be distributed in California (and in every other state in which the Enquirer is sold). South's sole contacts with California in connection with the article consisted of four telephone calls into the state, including one in which he read the article to Ingels prior to its publication, and one trip to California which was related in part to the article.

The National Enquirer did not contest the assertion of jurisdiction by the California court. Calder and South, however, appeared specially and moved to quash service of process on the ground that the court lacked personal jurisdiction over them.

The Decisions Below[1]

As required by the holding of this Court in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), the Superior

[1] Page references to the lower court decisions are as appearing in the appendices to Appellants' Statement as to Jurisdiction.

Court examined the defendants' contacts with the forum state. In weighing relevant factors, the court concluded that:

> [I]f the injury complained of in this case involved a physical injury sustained as a result of a physically defective magazine shipped into California, then the analysis would end at this point and the motion to quash would be denied. [17a]

However, relying upon well-reasoned authority, the court determined that "because the case involves First Amendment freedom of expression and because the defendants sought to be brought into this jurisdiction are employees of the publisher," *id.*, it was necessary further to weigh "First Amendment considerations . . . in the balance of fundamental fairness in resolving whether a state can compel a nonresident defendant to appear and defend an action." (18a)

Weighing those First Amendment considerations, the Superior Court concluded that the exercise of jurisdiction over the author and editor would have an impermissible chilling effect upon them and accordingly determined not to compel them to appear to defend the actions. As the court noted:

> Few would be willing to risk writing or editing controversial articles for national publications if they could be required personally to appear in remote jurisdictions as individual defendants and possibly suffer judgments for punitive damages, and surely pay unlimited litigation expenses. Thus, prudent reporters and editors would have an incentive to avoid controversial stories vastly disproportional to the rewards

> they could expect for their diligence and industry in uncovering truthful but controversial stories, especially stories adverse to wealthy or powerful individuals. If such a state of affairs were to come to pass, the informed public would be the loser. [19a-20a]

On appeal, the California Court of Appeal, Second Appellate District, reversed the Superior Court's decision. It declined to follow those decisions which have held, in the context of jurisdictional questions relating to out-of-state publishers (and their employees) sued in libel actions, that First Amendment considerations require a greater showing of contacts to satisfy the Due Process Clause than is necessary in other, run-of-the-mill tort cases. (4a-5a) It instead concluded:

> Inasmuch as defendants Calder and South have no special First Amendment privilege by virtue of their status as employees of the publisher of the allegedly defamatory article herein, the right of a California court to assert personal jurisdiction over them must be determined in accord with traditional principles unaffected by First Amendment considerations. [5a]

Applying these "traditional principles," the appeals court found that Calder was subject to jurisdiction because he had committed an act outside California with the intent to cause a tortious effect in California. The court made the same finding with respect to South, but also found that South had other contacts with California sufficient to permit the assertion of jurisdiction over him.

ARGUMENT

The court below erred in refusing to take First Amendment considerations into account in assessing whether personal jurisdiction was proper in this action.

A. The Legal Analysis

In *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), this Court laid down the now familiar rule that:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Milliken* v. *Meyer*, 311 U.S. 457, 463. *See* Holmes, J., in *McDonald* v. *Mabee*, 243 U.S. 90, 91.

326 U.S. at 316.[2] But, as far as the *amicus* is aware, this Court has never been called upon to interpret these due process guideposts in the context of a fact situation such as that posed by this case, involving non-residents whose business it is to gather and disseminate information and ideas to as wide an audience as possible and as to whom the jurisdictional claim is predicated on their very conduct of such business. AAP submits that such a fact setting (1) mandates a sensitive "minimum contacts" analysis, with due regard for the potential First Amendment impli-

2. As the Court subsequently noted, the "minimum contacts" rule serves at least two important functions: (1) "protect[ing] the defendant against the burdens of litigating in a distant or inconvenient forum" and (2) "ensur[ing] that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 291-92 (1980).

cations of the assertion of jurisdiction, and (2) in light of the fundamental importance of the constitutional function to be served by the press, warrants a more substantial showing of contacts than might otherwise be required in contexts not involving the First Amendment.

These principles have been well articulated in a number of lower court opinions. Thus, in *New York Times Co.* v. *Connor*, 365 F.2d 567, 572 (5th Cir. 1966), the court recognized that "First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity." The court's conclusion derived in substantial part from its concern that a publisher might discontinue distributing its works in a state where the size of its circulation did not balance the danger of exposure to liability for libel. *Id.* The court noted in this connection the undesirable impact that such a decision not to publish would have upon state residents who would be deprived of the opportunity to read the publication. *Id.*[3]

The fundamental recognition of the *Connor* decision—that in dealing with non-resident publishers and/or their

3. The *Connor* court rejected an inflexible view of the "minimum contacts" test, observing that consideration of First Amendment principles:

> is not intended for the convenience of individual publishers; nor does it ignore the resulting inconvenience to victims of libelous publications of limited distribution in their state. Rather, it is a recognition that jurisdiction based upon minimal contacts . . . when applied to the press will "limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties" and will "freeze out of existence" the distribution on a limited basis of publications espousing unpopular positions in a particular locale.

365 F.2d at 573.

employees, First Amendment considerations are relevant to the determination of whether due process requirements have been met—has been underscored in a number of subsequent decisions.[4] Likewise, later cases have held that, in the light of such First Amendment considerations, a showing of more substantial contacts with the jurisdiction than otherwise would be required is appropriate.[5]

Most recently, in *McCabe* v. *Jenkins and Associates, Inc.*, 531 F. Supp. 648 (E.D. Pa. 1982), the court, declining to permit a Pennsylvania resident to sue a California-based magazine publisher in Pennsylvania for defamation and invasion of privacy arising out of its publication of plain-

4. *See Cox Enterprises, Inc.* v. *Holt*, 678 F.2d 936, 937-38, *reh'g granted on other grounds*, 691 F.2d 989 (11th Cir. 1982) ("federal jurisdiction is subject to First Amendment considerations when a nonresident publisher is sued for libel"); *Edwards* v. *Associated Press*, 512 F.2d 258, 266 (5th Cir. 1975) ("When a court attempts to assess whether jurisdiction over a defendant is reasonable, First Amendment considerations are a significant factor to be weighed"); *Curtis Publishing Co.* v. *Golino*, 383 F.2d 586, 592 (5th Cir. 1967) ("first amendment considerations are a factor relevant to a determination of the jurisdictional question"); *Gonzales* v. *Atlanta Constitution*, 4 Med. L. Rptr. 2146, 2148 (N.D. Ill. 1979); *Johnston* v. *Time, Inc.*, 321 F. Supp. 837, 845-47 (M.D.N.C. 1970), *aff'd in part and vacated in part on other grounds*, 448 F.2d 378 (4th Cir. 1971); *cf. Buckley* v. *New York Post Corp.*, 373 F.2d 175, 183-84 (2d Cir. 1967) ("the First Amendment could be regarded as giving *forum non conveniens* special dimensions and constitutional stature in actions for defamation against publishers and broadcasters").

5. *See Edwards* v. *Associated Press*, 512 F.2d at 266 ("we have woven, in regard to entities clothed with First Amendment protections, a tighter due process net around state power than is true with regard to other entities"); *McCabe* v. *Jenkins and Associates, Inc.*, 531 F. Supp. 648, 654 (E.D. Pa. 1982) ("Courts confronted with this inherent tension between the first and fourteenth amendments to the Constitution have generally required a more substantial presence within the forum state in order to sustain *in personam* jurisdiction over publishers").

tiff's photograph, articulated the relevant First Amendment considerations as follows:

> The chilling effect that imposition of jurisdiction over any publisher would have on the free exercise of first amendment rights mandates a subtly different due process analysis. If a publisher stands in peril of being haled into court in any jurisdiction simply because a citizen of that jurisdiction came into possession of one of its publications, no speech would be disseminated beyond the territory in which the speaker can afford to litigate. Thus, if courts freely found *in personam* jurisdiction over publishers of first amendment articles under the same standards imposed on commercial entities, the citizens of each state would soon find themselves with access only to those publications with in-state revenues sufficiently high to justify the cost of litigation within that particular jurisdiction. In short, the legendary "free marketplace of ideas," a cornerstone of our constitutional scheme, would be transformed into a marketplace of ideas limited to those who can afford the cost of litigation in that particular marketplace.

531 F. Supp. at 654.

B. The First Amendment Interests at Stake

AAP believes from the experience of its members that the teaching of the cases discussed above is eminently sound. As previously noted, publishers are routinely subjected to costly and punishing libel litigation. It is burdensome enough for the publisher to be required to defend such actions in jurisdictions in which it may, from the substantiality of its activities, have some reason to expect it may be sued; it is impermissibly oppressive, however, to subject the publisher to such suits in remote jurisdictions with which it may have only the slightest business contacts.

Libel plaintiffs should not, as the decision below invites, be armed with a new weapon—the ability to "hale" a publisher and its authors and employees into court hundreds or perhaps thousands of miles from the publisher's principal place of business based solely upon the publisher's good fortune to have sold a small number of works in that jurisdiction.

Even worse, by "shopping" for a forum which has so little relationship to the publisher's activities, the libel plaintiff may well be seeking to take advantage of state rules, *e.g.*, relating to statutes of limitations, which are more liberal than those of the jurisdiction upon whose law the publisher normally depends. If allowed to succeed in doing so, libel plaintiffs would be thwarting the principles of comity enunciated by this Court by, in effect, substituting one state's view relating to lawsuits involving important constitutional issues for that of its sister states. *See World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286, 291-92 (1980).

Many of AAP's members, it is true, are "national" publishers in that they seek nationwide readership for their works. This does not, however, mean that they (or their authors, editors or employees) expect or enjoy a substantial business presence in each of the 50 states. Whatever the outcome under a traditional application of "minimum contacts" rules for a publisher whose works may be distributed only incidentally in a given state, it would impermissibly chill that publisher's interest in the broadest possible dissemination of its works were that publisher and its authors or employees amenable to suit in such state. The price, in terms of litigation risks, would simply outweigh the perceived benefits of wide readership. The problem is

exacerbated for smaller and regional publishers with even fewer regular sales in remote jurisdictions and, accordingly, expectations of—and likely less ability to defend against—lawsuits in such remote forums.

The nature of the distribution process for many book publishers' works makes the problem even more acute. Often, the publisher exercises no control over the locale of distribution of particular works after initial sale to its distributors. This being so as to such works, the publisher cannot simply stop selling in particular jurisdictions where it may not wish to take the risk of being sued. Its only recourse would be to refrain from creating the controversial material at all—a result wholly at odds with the goals of the First Amendment.

The publisher's plight is further aggravated in this context by its need for and reliance upon creative, talented and aggressive authors and editors willing to explore controversial subjects. Faced with the prospect of having to defend libel actions in remote jurisdictions, authors may choose either to seek publication of their works only on a local basis, to submit only the blandest, uncontroversial works to national publishers, or, worst of all, not to write on any provocative subjects at all. Because the author is even further removed from the channels of distribution than the publisher, he exercises little or no control over where his published works will be sold. Unless the decision below is reversed, the number of authors willing to write exciting, controversial works will surely contract.

AAP believes that it is insufficient to rely, as several courts have, on the notion that publishers are adequately

protected by the constitutional standards applicable to libel suits, *e.g.*, the requirement that a public official or public figure prove "actual malice" in order to prevail.[6] The disruption to the publishing process which results from having to defend a lawsuit on its merits, let alone the attendant costs, can be enormous. Conversely, if potential libel plaintiffs were required to demonstrate that a publisher has a substantial presence in a jurisdiction as a condition of maintaining suit there, the prospects of unnecessary and harassing litigations could be significantly lessened.

Conclusion

The requirements of the First Amendment dictate that special consideration be given to questions of personal jurisdiction that arise in the context of libel actions brought against non-resident publishers, their authors and employees. Because the court below failed so to recognize, its decision should be reversed.

Respectfully submitted,

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6. *See Church of Scientology* v. *Adams*, 584 F.2d 893, 899 (9th Cir. 1978); *Anselmi* v. *Denver Post, Inc.*, 552 F.2d 316, 324 (10th Cir.), *cert. denied*, 432 U.S. 911 (1977).

MOTION FILED

JUN 20 1983

IN THE

Supreme Court of the United States

October Term, 1982

82-1401

IAIN CALDER and JOHN SOUTH,

Appellants,

v.

SHIRLEY JONES and MARTY INGELS,

Appellees.

ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT

MOTION OF THE AUTHORS LEAGUE OF AMERICA, INC. FOR LEAVE TO FILE A BRIEF *Amicus Curiae*, WITH BRIEF ANNEXED

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ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Authors League of America is the national society of professional authors and dramatists, with a membership of 11,000. It respectfully petitions the Court for leave to file the annexed brief *amicus curiae*. One of the League's principal purposes is to express the views of its members in cases affecting authors' freedom of expression under the First Amendment. This is such a case. Affirmance of the decision below would greatly increase the risk that authors of controversial books would be subject to suits for libel or invasion of privacy in jurisdictions far distant from their homes. The additional cost and burden of defending such suits will magnify the "chilling effect" that produces self-censorship, and encourage the institution of such long-arm litigation as a weapon for punishing authors for writing critically, albeit non-libelously, about the disgruntled plaintiff and for compelling authors to suppress expression protected by the First Amendment. Therefore, The Authors League respectfully requests permission to file the annexed brief *amicus curiae*.

Respectfully submitted,

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BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. As *AMICUS CURIAE*

INTEREST OF AMICUS CURIAE

The Authors League is the national society of professional writers and dramatists. Many of its members write books which are distributed by publishers, who acquire the exclusive publishing right, throughout the country. The decision appealed from would permit any author to be sued for libel or invasion of privacy in a state where copies of his book were distributed, even though the author resided hundreds or thousands of miles away, and had no contacts with the state that would support such long-arm jurisdiction other than the distribution made by publishers, wholesalers or other third parties. Recognition of long-arm jurisdiction would seriously impair the freedom of expression granted to authors of books under the First Amendment and, we submit, violates the Amendment. Because of the serious threat to authors of books inherent in such a rule, the Authors League files this brief.

ARGUMENT

The First Amendment Prohibits A State From Assuming Jurisdiction Over Non-Resident Authors In Libel Suits Based on Distribution of Their Books, Or Gathering Of Information, Within The State.

(a) The First Amendment Imposes Limitations On Libel Suits to Protect Freedom of Expression

As this Court has emphasized, the First Amendment imposes limitations on suits for libel and invasion of privacy because otherwise authors and publishers "may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or *fear of the expense of having to do so.*" (emphasis added), *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). Authors and publishers of controversial, and non-libelous, books on matters of vital public interest could bear witness to the searing truth of this observation. Fear of the heavy expense and burden of defending suits for libel or invasion of privacy—even though devoid of merit—frequently leads to the chilling self-censorship of books that this Court sought to prevent in *New York Times* v. *Sullivan* and its progeny. That fear coerces authors and publishers into omitting or deleting from books crucial statements of public interest they believe true and accurate.

(b) First Amendment Limitations Preclude Establishment of Jurisdiction Based on Distribution or Information Gathering

The Authors League submits that the basic First Amendment principle that fear of the expense of defending libel suits should not be permitted to coerce the chilling self-censorship of non-libelous materials prevents states, from exercising long-arm jurisdiction over authors in libel and invasion-of-privacy suits, based on distribution of their books, or gathering of information, within the state. General-interest trade books, first published in hardcover editions, are the primary means of communicating to the public works of biography, history, economic and social commentary, and other literary works on

matters of public interest, as well as new fiction of literary merit. These books are written by self-employed authors, including thousands of Authors League members, who grant the exclusive publishing rights in their works to publishing firms.

One of the most serious threats to the freedom of expression of self-employed book authors is that they might be required to defend themselves against suits for libel or invasion of privacy, no matter how groundless, in the court of another state, hundreds or thousands of miles from the state in which the author resides and wrote the book. The decision appealed from here creates that threat for thousands of authors of books. The burdens and costs of defending these long-arm suits are far greater than suits brought in the jurisdiction where the author resides, including the higher fees of counsel who must be retained to defend in the foreign jurisdiction and the additional fees the author's own counsel may have to charge if he participates in the defense; the costs of travel and lodging in the foreign jurisdiction; and the heavy drain on the free-lance author's time and energy.

The fear of these additional costs and burdens will magnify the chilling effect that produces the self-censorship *New York Times* v. *Sullivan* sought to prevent. It will increase the pressure on free-lance authors to "steer wide" of including information or opinions that might thus drain their resources, even though of value to the public and true. Moreover, the recognition of such long-arm jurisdiction in libel and privacy suits will encourage the institution of such litigation as a means of punishing authors for writing critically, albeit non-libelously, about disgruntled plaintiffs; and as a weapon to compel authors to suppress information protected by the First Amendment. Knowledgeable plaintiffs and their attorneys realize that the greater burdens of defending long-arm suits make authors more vulnerable to their pressures, and more likely to capitulate.

The decision appealed from would permit a plaintiff in any state, or plaintiffs in several states, to establish jurisdiction over the author whose statements affronted them even though the author had no contacts with that state or states. The decision establishes the principle that the author must undergo the additional costs and burdens of defending these long-arm suits for libel or invasion of privacy because a publisher or wholesaler or other third party distributed copies of his/her book in that distant state or states.

This principle will place self-employed authors of books in an impossible situation. Although these authors create and own the copyrights in their works, their publishers invariably acquire—and insist on acquiring—exclusive ownership of all publishing rights in the work. Publishing contracts provide for the transfer of those rights to the publisher, and grant it the sole control over the publication and distribution of the book. The publisher alone determines how many copies will be printed, and the areas in which they will be distributed.

Even if authors wished to reduce the risk of exposure to long-arm litigation over controversial works, they do not have the power to do so. They could not, for example, limit distribution of their books to the major metropolitan areas (in a few states) which account for the great preponderance of sales of hardcover trade books. They could not prohibit distribution of books in the several states in which only a few copies are likely to be sold. The quantities of sales make such limitations theoretically possible . . . the total national sales of most trade books, including those making the most valuable social, political and literary commentary, are measured in the thousands or tens of thousands of copies—not in hundreds of thousands, or millions of copies. But authors do not possess the contractual power to impose those limitations. And it would be an ironic consequence if the recognition of long-arm jurisdiction based on distribution lead publishers to attempt to limit their risks by imposing such unofficial censorship on the readers of many states.

We also submit that the First Amendment guarantee of freedom of expression for authors of books would, for the same

reasons, be violated by a rule which grounded long-arm jurisdiction over an author on his or her telephone calls to a state, or occasional visits to it, solely for the purpose of gathering information. This would inhibit the essential First Amendment process of research.

CONCLUSION

It is respectfully submitted that the decision appealed from should be reversed.

Respectfully submitted,

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June 17, 1983

CERTIFICATE OF SERVICE

IRWIN KARP, a member of the bar of the United States Supreme Court and attorney for The Authors League of America, Inc. hereby certifies that on June 17, 1983, he served the foregoing Motion For Leave To File A Brief *Amicus Curiae* and Brief *Amicus Curiae* of The Authors League of America, Inc. on the attorneys for the parties by mailing copies of said motion and brief to the attorneys at the following addresses:

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ION FILED
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OCTOBER TERM, 1982

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On Appeal from the California Court of Appeal, Second Appellate District

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE FOR THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; ADVANCE PUBLICATIONS, INC.; AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION; AMERICAN SOCIETY OF NEWSPAPER EDITORS; ASSOCIATED PRESS; ASSOCIATED PRESS MANAGING EDITORS; DOW JONES & COMPANY, INC.; THE HEARST NEWSPAPER CORPORATION; THE LOS ANGELES TIMES; THE MIAMI HERALD PUBLISHING COMPANY; NATIONAL ASSOCIATION OF BROADCASTERS; NATIONAL NEWSPAPER ASSOCIATION; BOARD OF GOVERNORS OF THE NATIONAL PRESS CLUB; THE NEW YORK TIMES COMPANY; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI; THE WASHINGTON POST; AND THE WASHINGTON PRESS CLUB.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1401

IAIN CALDER AND JOHN SOUTH,
Appellants,

v.

SHIRLEY JONES,
Appellee.

On Appeal from the California Court of Appeal, Second Appellate District

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MOTION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *ET AL.*, FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF APPELLANTS' BRIEF ON THE MERITS

The Reporters Committee for Freedom of the Press, *et al.*, hereby move this Court for leave to file a brief as *amici curiae* in support of the appellants' Brief on the Merits in this case. The consent of the appellants has been obtained. App. A. Appellees have refused to consent to the filing of this *amici* brief. App. B.

The movants asking for leave to file this brief represent organizations and individuals engaged in the gathering and dissemination of news reports concerning matters of public interest. They believe their ability to serve the public in this capacity will be greatly encumbered by the decision below.

Movants believe that their brief *amici curiae* will aid this Court by (1) clarifying the far-reaching ramifications of the California Court of Appeal decision, (2) describing how the decision below, if affirmed, will be detrimental to the ability of reporters and editors to fulfill their goal of informing the public, (3) elucidating why the decision below is inconsistent with jurisdictional principles established by this Court and is in conflict with other state and federal court rulings and (4) explaining why First Amendment protections should be considered in determining whether to allow a distant state to impose personal jurisdiction over a reporter or editor.

Accordingly, movants respectfully request this Court to grant leave to file the accompanying Joint Brief for *Amici Curiae* in support of appellants' Brief on the Merits.

Respectfully submitted,

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---

BRIEF AMICI CURIAE FOR THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; ADVANCE PUBLICATIONS, INC.; AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION; AMERICAN SOCIETY OF NEWSPAPER EDITORS; ASSOCIATED PRESS; ASSOCIATED PRESS MANAGING EDITORS; DOW JONES & COMPANY, INC.; THE HEARST NEWSPAPER CORPORATION; THE LOS ANGELES TIMES; THE MIAMI HERALD PUBLISHING COMPANY; NATIONAL ASSOCIATION OF BROADCASTERS; NATIONAL NEWSPAPER ASSOCIATION; BOARD OF GOVERNORS OF THE NATIONAL PRESS CLUB; THE NEW YORK TIMES COMPANY; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI; THE WASHINGTON POST; AND THE WASHINGTON PRESS CLUB.

INTEREST OF AMICI CURIAE

This brief *amici curiae* is filed in support of appellants, Iain Calder and John South. It is accompanied by the written consent of appellants (App. A), the appellee's refusal (App. B) and a Motion for Leave to File a Joint Brief for *Amici Curiae*.

These *amici curiae* are national organizations that together represent a broad spectrum of working journalists, newspapers, broadcast stations and networks and others involved in the gathering and dissemination of news to the public. *Amici* include both large and small news organizations. They view the California Court of Appeal's decision as a threat to the free dissemination of news and public affairs information to the American public.

This case does not involve the imposition of jurisdiction under California's "long-arm" statute on the publisher of a national newspaper. Instead, it squarely presents the question of whether a reporter or editor who has had occasional but sporadic contacts with a distant state while performing news gathering or editing activities is subject to personal jurisdiction. Such a holding would require defending a defamation action in a state hundreds or thousands of miles from where the journalist lives and works. Further, this Court is asked to determine if a journalist will face the prospect of being "haled" into court in various foreign jurisdictions as a result of attempting to gather as much information for a story as possible, including from out-of-state sources.

Affirming the decision below will affect reporters and editors working for large and small print and broadcast media. They may hesitate before preparing stories involving information sources in states far from those in which they live and work. They may choose to rely on information gathered locally or decide not to report certain stories at all. Journalists employed by large news organizations are vulnerable because they often report on

national events. When key editorial personnel are forced to appear in distant states the normal operations of even major media organizations are affected adversely. Although some smaller media do not often deal with stories outside of their states of publication, when they do they may feel the impact of "long-arm" jurisdiction more severely than the larger media. The loss of a journalist who spends months defending a defamation suit in a distant state may cause sufficient editorial disruption and financial drain that the publication or station is forced out of business.

It is for these reasons, as explained further below, that *amici* express their views to this Court. *Amici* believe that if journalists are subject to personal jurisdiction in distant states as the result of occasional news gathering activities, the flow of news and information to the public will be significantly impeded.

Affirming the decision of the court below will have a deleterious effect on news and information dissemination. Journalists are aware of the rising number of defamation suits filed each year. In light of this, a holding that their news gathering activities subject them to being "haled" into distant courts will inhibit journalists on large and small media alike from engaging in the robust reporting this Court long has fostered.

STATEMENT OF FACTS

Amici adopt the appellants' statement of the facts and summarize it as follows:

Appellee, a professional entertainer and resident of California, with her husband, Mr. Marty Ingels, brought this action for libel and related torts against the National Enquirer, Inc., and the two appellants, Iain Calder and John South. The claim was based on an article appearing in the *National Enquirer*'s October 9, 1979, issue which stated that appellee's husband "has terrorized his staff,

cheated stars, outraged advertisers and scandalized Hollywood," and that appellee has been "driven to drink by [her husband's] bizarre behavior." J.A. 11.[1]

The plaintiffs sought general damages of $10 million and punitive damages of $10 million. After maintaining that the article was untrue, appellee's husband filed a request for dismissal of his complaint on the morning of his deposition. Appellee has continued to pursue the litigation on her own behalf.[2]

Appellant Calder is employed as editor and president of the *Enquirer*. Appellant South is employed by the *Enquirer* as a reporter. South's byline appeared on the article in question.

Both appellants were served with process by mail in Florida. They caused special appearances to be entered on their behalf and moved to quash service of process, challenging the constitutionality under the First and Fourteenth Amendments of the application to them of the California "long-arm" statute.[3]

The undisputed evidence before the trial court showed that Calder and South reside and have their offices in Florida. They never have had an office or place of business in California, nor conducted business, owned property, obtained credit or had bank accounts there. Calder

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[1] J.A. refers to the Joint Appendix.

[2] On May 31, 1983, this Court entered an order dismissing as moot the appeal as to appellee's husband. Appellee has continued to demand damages of $20 million.

[3] California Code of Civil Procedure § 410.10 provides:

> "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

The *Enquirer*, a Florida corporation with principal place of business in Florida, and its Los Angeles distributing company did not contest the California court's jurisdiction and answered the complaint.

did not visit or telephone to California in connection with the story in question. He did not participate in the investigation for or preparation of the article. He only performed routine editorial services regarding the article, and these took place at his Florida office. All of South's services in connection with the article took place at his Florida office. There he made a few long-distance telephone calls to California in connection with research for the article as well as a call to Ingels to read him the article before publication to invite his comment.

After weighing "First Amendment considerations . . . in the balance of fundamental fairness," J.A. 96, the trial court granted appellants' motion to quash service. The California Court of Appeal reversed, contending that "a special First Amendment test," J.A. 110, cannot be applied to the jurisdictional question. The court found jurisdiction over Calder and South proper because the complaint alleged an intentional tort, i.e., that appellants "committed [an act] outside the forum state with the intent to cause a tortious effect within the state." J.A. 115. Alternatively, jurisdiction over South was upheld on the basis of his telephone call to Ingels which "constituted the doing of a significant act in California." J.A. 116.

SUMMARY OF ARGUMENT

The decision of the California Court of Appeal should be reversed on the basis of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny. In *International Shoe*, this Court held that a state may exert personal jurisdiction over a non-resident only if there exist certain "minimum contacts" between the defendant and the forum so that "traditional notions of fair play and substantial justice" are not offended. Later cases establish that it must be "reasonable" to hold a defendant subject to a distant state's jurisdiction.

Editor Calder had no contact at all with California and reporter South only placed a few telephone calls to the state. These are insufficient contacts to allow California to impose jurisdiction.

Additionally, contrary to the position taken by the court below, it has been found that mere authorship of an article which is circulated by a publication cannot provide a constitutional basis for "long-arm" jurisdiction.

Nor can appellants' alleged "intent" to cause a tortious injury be a sufficient basis, as held by the court below. If "intent" is construed to mean intent to perform the act which causes the harm, there would never be a bar to imposition of "long-arm" jurisdiction since all reporters and editors "intend" to write or edit articles. If "intent" is held to mean the intent to cause the harm resulting from the act, intent or fault would have to be presumed to justify jurisdiction. This Court has held such a presumption may not be made in the context of a defamation action. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). Thus, "intent" should never be a criterion, and a finding of personal jurisdiction must be based on additional elements to meet due process requirements.

On the other hand, if the appellants' few contacts with California would be considered sufficient, the First Amendment's protection of the press precludes imposing jurisdiction over appellants. Numerous courts have held that the First Amendment is a factor that must be considered in determining whether "long-arm" jurisdiction is proper in defamation actions brought against the media. Such a rule applied in the instant case will make clear that the danger created in exposing appellants to potential liability far outweighs California's incidental interest in asserting jurisdiction. Journalists should not be forced to decide whether or not to write controversial stories based on the threat of suits in a distant state.

ARGUMENT

I. APPELLANTS HAD INSUFFICIENT CONTACTS WITH THE FORUM STATE TO SATISFY DUE PROCESS REQUIREMENTS FOR ALLOWING IMPOSITION OF IN PERSONAM JURISDICTION

A. Due Process Requires Sufficient Contacts with the Forum So That Imposition of Jurisdiction "Does Not Offend Traditional Notions of Fair Play and Substantial Justice"

The due process clause of the Fourteenth Amendment limits the power of a state court to obtain *in personam* jurisdiction over a non-resident. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878). This Court has held that such personal jurisdiction may be exercised only if there exist certain "minimum contacts" between the defendant and the forum state such that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington, supra*, 326 U.S. at 316 (*quoting Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). This standard serves two functions: "It protects the defendant against the burdens of litigation in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

In evaluating the sufficiency of the defendant's contacts with the forum, a court must consider the "quality and nature of the activity" engaged in by the defendant. *International Shoe Co. v. Washington, supra*, 326 U.S. at 319. This may be assessed by determining whether the defendant has "purposefully availed itself" of the privilege of conducting activities within the forum, thereby invoking the benefits and protections of its laws. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Also, the defendant fairly must have anticipated "being haled into court" in the forum state. *World-Wide Volkswagen Corp. v. Woodson, supra*, 444 U.S. at 297.

California's "long-arm" statute allows exercise of jurisdiction "on any basis not inconsistent" with the requisites of due process. Cal. Civ. Proc. Code § 410.10 (West 1973). The due process requirements are applicable to natural persons as well as corporations, *Shaffer v. Heitner*, 433 U.S. 186 (1977), and are determined by the facts and circumstances of each case. *Kulko v. California Superior Court*, 436 U.S. 84 (1978). However, in the end, a court's concept of what constitutes minimum contacts in order to assert personal jurisdiction over a non-resident will be molded to meet the needs of justice. *See Curtis Publishing Co. v. Golino*, 383 F.2d 586, 588-89 (5th Cir. 1967). Thus, it must be "reasonable" to subject a defendant to "long-arm" jurisdiction. *International Shoe Co. v. Washington, supra*, 326 U.S. at 317; *World-Wide Volkswagen Corp. v. Woodson, supra*, 444 U.S. at 292.

B. Appellants' Contacts with the Forum Do Not Meet "Minimum Contacts" Requirements

1. *The Quality and Nature of Appellants' Contacts Are Insufficient to Justify Imposition of Jurisdiction*

In *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), this Court held that due process restrictions on imposing personal jurisdiction on a non-resident are more than a guaranty of immunity from distant litigation; they are a consequence of the constitutional limitation on each state's territorial powers. That is, even if the defendant faces a minimal burden of defending in a foreign forum, the defendant may not be required to do so unless there exist "minimum contacts" with that state. The minimum contacts rule, said this Court, will vary with the quality and nature of the defendant's activity, but in each case there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla, supra*, 357 U.S. at 253.

Appellants contend that the actions of reporter South and editor Calder do not meet the "minimum contacts" test. That is, sporadic telephone calls by South and reading a proof of the article in question by Calder, all occurring in Florida, do not constitute a sufficient nexus to the claim alleged that the exercise of *in personam* jurisdiction by California courts would comport with the due process requirements of the Fourteenth Amendment.

In determining the sufficiency of contacts, courts consider, for example, questions of residency or bank accounts in, and telephone calls or visits to, the forum state. These same criteria apply to reporters and editors.[4] As the court below noted, neither South nor Calder ever lived in nor had bank accounts in California. *See Cox Enterprises, Inc. v. Holt*, *supra*, 678 F.2d at 939. Editor Calder did not make telephone calls to or visit California in connection with the story in question. Reporter South made a few telephone calls to California to gather information for the story and one call to invite Ingels' comment.

Other courts have held that such actions by reporters and editors do not rise to the level of "minimum contacts." For example, the court in *Cox Enterprises, Inc. v. Holt*, *supra*, 678 F.2d at 939, found no "purposeful activity" in the forum state by a reporter who did not live in nor travel to the state. Similarly, in *Church of Scientology of California v. Adams*, 584 F.2d 893, 896 (9th Cir. 1978), jurisdiction could not be imposed on non-resident reporters who had not been in the forum state "during the last fifteen years." *See also Ziegler v. Ring Publishing*, 9 Med. L. Rptr. 1303, 1304 (S.D. Fla. 1982) (jurisdiction not permitted over non-resident editor who had not been in forum "in five years"); *Gonzales v. At-*

[4] Perforce, different indicia of "minimum contacts" apply to corporations than apply to individuals. Similarly, different indicia apply to publishers than to reporters. *See, e.g.*, Cox Enterprises, Inc. v. Holt, 678 F.2d 936, 938-39, *rehearing on other grounds*, 691 F.2d 898 (11th Cir. 1982); Jones v. National Enquirer, Inc., No. C 305 009 (Cal. Super. Ct. Oct. 2, 1981) (J.A. 93).

lanta Constitution, 4 Med. L. Rptr. 2146, 2147 (N.D. Ill. 1979) (jurisdiction not permitted over non-resident reporter who had not been in forum for year and "did not telephone, write or otherwise have any contact or communication with" forum). Additionally, in a case involving real estate marketing, a California appellate court found that two letters and six or seven telephone calls into the forum were not sufficient contacts to justify the imposition of personal jurisdiction. *R. E. Sanders & Co. v. Lincoln-Richardson Enterprises, Inc.*, 108 Cal. App. 3d 71, 77-78, 166 Cal. Rptr. 269, 272-73 (1980).

On the basis of these principles, editor Calder cannot be found to have had sufficient contacts with the forum to allow personal jurisdiction to be imposed; he had no direct contacts with the state.

As the court below found, reporter South's few telephone calls also are insufficient contacts to permit "general jurisdiction" over him. J.A. 112-113. They do not rise to the level of a "presence" in the state nor do they constitute "systematic and continuous" contacts. *International Shoe Co. v. Washington*, *supra*, 326 at 158, 160. Rather, they were "irregular," *id.*, and sporadic, insufficient to allow imposition of general "long-arm" jurisdiction for the cause of action.

Also as found below, appellants did not "purposefully avail" themselves of "the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, *supra*, 357 U.S. at 253. A journalist's occasional telephone calls do not constitute "conducting activities" as this Court has used that term.[6]

Thus, the "quality and nature" of the appellants' actions do not permit imposition of personal jurisdiction by a distant forum.

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[6] This case is distinguished from cases involving minimum contacts where there were direct business dealings between plaintiff and defendant. *See, e.g.*, McGee v. International Life Insurance Co., *supra*, 335 U.S. 220.

2. *Mere Authorship of an Article Which Is Circulated by a Publication Cannot Provide a Constitutional Basis for Personal Jurisdiction*

Contrary to the position taken by the court below, it often has been held that mere authorship of an article which is circulated by a publication cannot provide a constitutional basis for *in personam* jurisdiction over the author. For example, in *Riverhouse Publishing Co. v. Porter*, 287 F. Supp. 1 (D.R.I. 1968), the court refused to find jurisdiction over financial columnist Sylvia Porter in a libel action although her column appeared on a regular weekly basis in a newspaper published in Rhode Island. The state "long-arm" statute was similar to that in California, i.e., allowing jurisdiction within constitutional limits. Noting that the column was sold by the writer to a syndicate which determined where it was to be published, the Court stated of Porter:

> From the uncontradicted facts, it must be concluded she has no contact with the State of Rhode Island. Her only connection with it is that the product of her labors—a newspaper column—appears on a syndicated basis in the Providence Journal. This constitutes an insufficient relationship with the State of Rhode Island to permit the maintenance of a suit against her in this jurisdiction.

Id. at 7. The court held that an assertion of jurisdiction over the columnist would violate due process.

Similarly, in *Church of Scientology of California v. Adams, supra*, 584 F.2d 893, the Ninth Circuit refused to find jurisdiction in California over the individual writers of an allegedly libelous article published in the *St. Louis Post Dispatch* in Missouri. Circulation of copies of the newspaper in California did not give that state jurisdiction over writers who were regular employees of the newspaper, because to do so would violate due process. Noting that the authors were "residents of Missouri," *id.* at 896, the court found that their employment by the newspaper and authorship of the pieces were insufficient

contacts to sustain jurisdiction in California where "[n]o research was done . . . and the articles were not written in that state." *Id.* at 898; *see generally Taylor v. Portland Paramount Corp.*, 383 F.2d 634 (9th Cir. 1967) (no jurisdiction over Elizabeth Taylor in Oregon notwithstanding that Twentieth Century-Fox distributed "Cleopatra" there).

A similarly overreaching assertion of jurisdiction was unequivocally rejected as a violation of due process in *Graciette v. Star Guidance, Inc.*, 66 F.R.D. 424, 427 (S.D.N.Y. 1975). There, an author

> [f]or the lump sum of $45 . . . sold outright the article upon which the California action was based, without reservation of copyright or other interest, to Star Guidance, Inc. ("Star"), a New York-based corporation, in New York City. Subsequently, Star had the article copyrighted and published it in Star's magazine, *Your Personal Astrology*, copies of which were sold in California.

Although plaintiff argued that jurisdiction attached on the ground that the author's sale of the article to the magazine was an act done with the intention of causing effects in California or at least an act which reasonably could have been expected to cause effects there since the magazine had a large national circulation, including circulation in California, the court found that:

> Merely to state this argument demonstrates its frailty and the tenuousness of defendant's relationship with California. Surely, knowledge of the magazine's circulation is not tantamount to intent to cause an effect in a specific state, especially where the defendant derived no benefits from the magazine's subsequent use of his article other than a supposed aggrandizement of his reputation and the hypothetical increased value of his works resulting therefrom.

Id. at 428. The court further found that in light of the hardship which would otherwise be imposed on the author,

it violated due process for the California court to exercise jurisdiction.

Accordingly, California cannot properly assert jurisdiction over the person of either Calder or South.

3. *Appellants' "Intent" Is Not Pertinent to the Jurisdictional Question*

In assessing whether California properly could assert jurisdiction over appellants, the Court of Appeal reviewed and rejected several grounds on which such action could be upheld, i.e., minimum contacts with the forum, " 'extensive or wide-ranging' . . . or 'substantial . . . continuous and systematic' " activities in the forum and "whether the cause of action arises out of or has a substantial connection with" appellants' activity in the forum. J.A. 112. Properly unable to find any of these theories applicable to appellants, J.A. 112-13, and admitting that "defendant Calder did not enter California or even make telephone calls into the state in connection with his role in the preparation of the subject article," J.A. 113, the Court of Appeal relied on a different standard.

The California Court of Appeal found imposition of personal jurisdiction over appellants proper based on a presumption that Calder and South "intended to cause injury to plaintiffs in California where they reside; such injury in fact occurred." J.A. 114. The court rejected the holding in *Sibley v. Superior Court*, 16 Cal. 3d 442, 446, 546 P.2d 322, 325, 128 Cal. Rptr. 34, 37 (1976), that the "mere causing of an 'effect' . . . is not necessarily sufficient to afford a constitutional basis for jurisdiction; notwithstanding this 'effect,' the imposition of jurisdiction may be unreasonable." Since appellants' conduct was "an intentional and malicious tort," reasoned the court below, causing an "effect" in the forum state was sufficient to meet due process standards. J.A. 115 (*quoting Abbot Power Corp. v. Overhead Electric Co.*, 60 Cal. App. 3d 272, 281, 131 Cal. Rptr. 508, 514 (1976)).

The common law construes "intent" in the context of torts to mean an intention to cause the consequences of an act as opposed to the intent to perform the act that leads to an injury. *See* Restatement (Second) of Torts § 8A (1965); Prosser, Law of Torts 31 (4th ed. 1971). This defines an intentional tort. As the probability of the occurrence of harm decreases to a minimal level, the actor's conduct becomes ordinary negligence, even though he still may intend to perform the act leading to the injury. Restatement (Second) of Torts § 8A at comment b; *see id.* at § 282 comment d.

The California Court of Appeal accepted without proof appellee's allegation that appellants acted with "evil motive and malice, wilfully and wrongfully with the intent to injure, disgrace and defame plaintiffs." J.A. 9. No proof of such "intent" has been adduced, nor have appellants had an opportunity to present proof to the contrary. If this Court affirms the lower court's holding that "long-arm" jurisdiction over an editor or reporter in a defamation action may be obtained solely on the unsupported ground that the journalist intended "to cause a tortious effect" or "to cause a tortious injury," J.A. 113, this Court's ruling in *Gertz v. Robert Welch, Inc., supra*, 418 U.S. 323, would be called into question. There it was held that intent cannot be presumed in defamation cases; fault is an element that must be proven by the plaintiff. *Id.* at 347. Thus, a trial would be required to prove a defendant journalist had the intent to injure the plaintiff. It is unreasonable under *International Shoe* to delay a jurisdictional decision until a decision on the merits is made.

Moreover, if this Court affirms the lower court decision it would mean that had the reporter gathered the information only in Florida and the editor edited the article in Florida, their alleged "intent" to cause harm would subject them to California's jurisdiction despite no contact at all with California by either the editor or the reporter. Certainly this would not comport with *Inter-*

national Shoe's "notions of fair play and substantial justice." An allegation and presumption of intent to injure a plaintiff through a defamation cannot be found sufficient in the face of the many cases that have held personal jurisdiction must not be imposed on out-of-state journalists without more direct contacts with the forum. *See, e.g., Cox Enterprises, Inc. v. Holt, supra*, 678 F.2d 936; *Church of Scientology of California v. Adams, supra*, 458 F.2d 893; *Ziegler v. Ring Publishing, supra*, 9 Med. L. Rptr. 1303; *Gonzales v. Atlanta Constitution, supra*, 4 Med. L. Rptr. 2146; *McBride v. Owens*, 454 F. Supp. 731 (S.D. Tex. 1978).

If the mere doing of an act, such as writing or editing of an article, is sufficient to permit imposition of personal jurisdiction by a distant forum, then there never would be a bar to "long-arm" jurisdiction in a defamation case. Every journalist who writes or edits an article intends to so write or edit.

Thus, "intent" should never be considered a criterion in determining jurisdiction in a defamation suit. If defined as meaning intent to perform the act leading to the effect, jurisdiction always can be found. If defined as meaning intent to cause the tortious effect, jurisdiction can be found only after a trial on the merits. Both of these are unreasonable under *International Shoe*. In either case, at the jurisdictional stage something more is needed—at least a finding of minimum contacts with the forum state so as to satisfy the principles of "fair play and substantial justice" required in all torts cases.

Finding that appellants "acted maliciously and with the intent to injure plaintiffs," J.A. 114, the California Court of Appeal used "intent as the sole criterion in allowing personal jurisdiction." Such a standard should not be acceptable in defamation actions. More must be required.

C. Even If Appellants' Contacts Were Sufficient, the Consequences of Imposing Personal Jurisdiction Make It Unfair and Unjust to Do So

As discussed above, a state is without authority to exercise personal jurisdiction over nonresidents unless the non-residents have had "minimum contacts" with the forum. *See World-Wide Volkswagen v. Woodson, supra,* 444 U.S. at 291-92. However, "minimum contacts" between the defendant and the forum is not a dispositive criterion. It also must be fair and reasonable to require the defendant to come into the distant state to defend the suit. *See id.* at 292; *International Shoe Co. v. Washington, supra,* 326 U.S. at 317. This Court emphatically has stated:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of intrastate federalism, may sometimes act to divest the State of its power to render a valid judgment.

World-Wide Volkswagen v. Woodson, supra, 444 U.S. at 294.

Reporters and editors are exceptionally vulnerable to defamation suits.* They may be forced not only to defend themselves against defamation actions, but may face the extreme burden of doing so at great distances from their

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* One researcher found a significant increase recently in trial and appellate level defamation cases in which the defendant was a mass medium: 1977—52; 1978—79; 1979—84; 1980 (cases decided by September 30)—76. Franklin, *Suing Media for Libel: A Defamation Study*, 1981 Am. B. Found. Research J. 795, 799.

places of residence and work. As one court has said, it is important to realize that a reporter or editor may be

> subjected to a trial involving weeks or months and tremendous expense in a forum several hundred miles from his home and occupation. Conceivably this factor could become a prime consideration in a . . . decision to report and publish items critical of national figures. To hold otherwise could provide a vehicle for a plaintiff agrieved, real or imagined, to bombard the national media with litigation for no other purpose than harassment.

Westmoreland v. CBS, 8 Med. L. Rptr. 2493, 2496-97 (D.S.C. 1982). This is particularly applicable to Calder and South who, as editor and reporter on a national magazine, were sued for libel by two national figures. As the trial court below stated in relation to appellants:

> Indeed, in balancing the interests of all parties to this action, it appears that the principal practical effect of holding the individual defendants as parties to this lawsuit would be to facilitate plaintiffs' claims for punitive damages against the individuals. Such claims are asserted in addition to plaintiffs' claims for such damages against the publisher. Surely the right of a plaintiff to punish a defendant resident of a remote jurisdiction, and to receive damages beyond those necessary to compensate him for his injury should not weigh heavily on the constitutional scale of fundamental fairness.

J.A. 96-97.

Thus, if the decision below is affirmed it is likely that plaintiffs will be encouraged to pull journalists to distant forums to defend defamation actions, including those filed for harassment purposes. In light of this, as well as the fact that appellee here looks for no more than additional punitive damages from appellants, it is neither fair nor reasonable to subject appellants to personal jurisdiction in California.

II. UNDER THIS COURT'S CLASSIC HOLDINGS FOR OVER FIFTY YEARS THE ADDITIONAL FACTOR OF FIRST AMENDMENT PROTECTION FOR DISSEMINATION OF NEWS AND IDEAS PRECLUDES IMPOSING JURISDICTION OVER APPELLANTS, EVEN ASSUMING ARGUENDO THAT APPELLANTS' CONTACTS WITH THE FORUM WERE BARELY SUFFICIENT TO SATISFY THE "MINIMUM CONTACTS" TEST

A. The First Amendment's Protection of News and Information Must Be Considered in Determining Whether Imposition of Jurisdiction Over Out-Of-State Journalists Offends "Fair Play and Substantial Justice"

This Court has held for more than half a century that the First Amendment affords expression of news and political ideas a protection against state regulation greater than that available to most other activities in the private sector. As recently as this Term, the Court found violative of the First Amendment a statute imposing a special tax on newspapers: "A tax that burdens the rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest." *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 103 S. Ct. 1365, 1370-71 (1983).

That expression of news and political ideas by the media and others is entitled to greater protection from state regulation—and assertion of jurisdiction clearly is a type of regulation—than other types of activities consistently has been recognized in this Court's decisions. *See, e.g., Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Near v. Minnesota*, 283 U.S. 697 (1931). If these cases had involved activities not at the core of the First Amend-

ment, this Court would have allowed states to impose regulatory powers. It was because the activities did involve the First Amendment that this Court required the states to show a compelling state interest before regulation would be permitted.

Similarly, if appellants had been sued for committing a tort not related to freedom of expression, jurisdiction would have been proper if the "minimum contacts" test had been met and imposition of jurisdiction otherwise was fair. But here, where the alleged tort stems from a protected First Amendment activity, a higher standard than "minimum contacts" is required before personal jurisdiction may be imposed.

Holdings of this Court discussed above support the contention that a higher standard is necessary where expression is concerned. Determining the fairness of imposing jurisdiction requires balancing the nature of the activity against the nature of the contacts. Expression is a protected activity; a compelling state interest must be present to allow burdening that freedom. Bare "minimum contacts" is an insufficient criterion to show an overriding state interest in imposing personal jurisdiction on a foreign libel defendant. The standard must be a higher one.

This Court has held that in determining whether it is reasonable to subject a defendant to personal jurisdiction in a distant forum, the "burden on the defendant" and "other relevant factors" must be considered. *World-Wide Volkswagen v. Woodson, supra*, 444 U.S. at 292. Numerous courts have held that, in defamation actions brought against the media, one of those additional factors must be the First Amendment's protection of the "uninhibited, robust, and wide-open" debate on public issues. *New York Times Co. v. Sullivan, supra*, 376 U.S. at 270.

The Court of Appeals for the Fifth Circuit was the first to apply First Amendment considerations to the law

of jurisdiction in a libel case. *Time, Inc. v. Manning*, 366 F.2d 690 (5th Cir. 1966); *Buckley v. New York Times Co.*, 338 F.2d 470 (5th Cir. 1964); *Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964). Relying on *Buckley*, the court in *New York Times Co. v. Connor*, 365 F.2d 567, 572 (5th Cir. 1966), stated that "First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity."

Since *Connor*, courts have used various phrases to describe the impact of the First Amendment in deciding jurisdictional questions. The Court of Appeals for the Fifth Circuit, for example, has said that "First Amendment considerations are a significant factor to be weighed." *Edwards v. Associated Press*, 512 F.2d 258, 266 (5th Cir. 1975). The Eleventh Circuit has said that "jurisdiction is subject to First Amendment considerations when a non-resident publisher is sued for libel." *Cox Enterprises, Inc., v. Holt, supra*, 678 F.2d at 937. A federal district court found that the First Amendment element "tilts the scales decisively" in favor of a defendant publisher. *McCabe v. Kevin Jenkins and Associates, Inc.*, 531 F. Supp. 648, 654 (E.D. Pa. 1982). Judge Medina of the Second Circuit has said, "I am not shocked to see the principles embedded in the First Amendment applied to the expanding subject of jurisdiction over the person." *Buckley v. New York Post Corp.*, 373 F.2d 175, 184 (2d Cir. 1967) (Medina, J., concurring). Thus, courts agree that the First Amendment is one of the "relevant factors" that must be considered in determining whether imposition of personal jurisdiction over non-resident journalists in a defamation case comports with due process requirements.[7]

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[7] *See* Comment of Judicial Council to Cal. Civ. Proc. § 410.10, "Bases of Judicial Jurisdiction Over Individuals," at 9:

> Some actions, such as defamation, affect interests of a defendant that are protected by the First Amendment of the United

Such a rule must be applied in this case. Courts should be required to weigh any relevant First Amendment interests in determining whether the assertion of personal jurisdiction over a non-resident journalist in a defamation action is fair and reasonable. This approach has been adopted in the majority of jurisdictions that have considered the issue.[8]

A few courts have failed to appreciate the nature of the First Amendment policy interests present in these types of cases. *See, e.g., Anselmi v. Denver Post, Inc., supra,* 552 F.2d 316. Most lower courts, however, have developed the doctrine of weighing First Amendment considerations in determining jurisdiction because the very act of asserting jurisdiction may cause a chilling effect. Controversial stories may be watered down or withdrawn based on the specter of defending a libel suit in a remote jurisdiction. It therefore is desirable and consistent with

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States Constitution. For a state to have judicial jurisdiction over such action, it may be that the defendant must have a closer relationship to the state, or have caused effects of a more substantial nature in the state, than would otherwise be required.

The Court below failed to consider this language.

[8] *See* Cox Enterprises, Inc. v. Holt, *supra*, 678 F.2d at 937-38; Edwards v. Associated Press, *supra*, 512 F.2d at 266; Rebozzo v. Washington Post Co., 515 F.2d 1208, 1214-15 (5th Cir. 1975); Curtis Publishing Co. v. Golino, *supra*, 383 F.2d at 592; New York Times Co. v. Connor, *supra*, 365 F.2d at 572; Time, Inc. v. Manning, *supra*, 366 F.2d at 695; Walker v. Savell, *supra*, 335 F.2d at 544; McCabe v. Kevin Jenkins and Associates, Inc., *supra*, 531 F. Supp. at 654-55; Burlotos v. News, 6 Med. L. Rptr. 1986, 1988 (D.N.J. 1980); Gonzales v. Atlanta Constitution, *supra*, 4 Med. L. Rptr. at 2148; McBride v. Owens, *supra*, 454 F. Supp. at 735; Margoles v. Johns, 333 F. Supp. 942, 946 (D.D.C. 1971), *aff'd*, 438 F.2d 1212 (D.C. Cir. 1973); Johnston v. Time, Inc., 321 F. Supp. 837, 846-47 (M.D.N.C. 1970); Bradlee Management Services v. Cassells, 249 Ga. 717, 292 S.E.2d 717, 720 (1982); *but see* Anselmi v. Denver Post, Inc., 552 F.2d 316, 324 (10th Cir.), *cert. denied sub nom.* Times Mirror Co. v. Anselmi, 432 U.S. 911 (1977).

Gertz to assess the First Amendment interests *before* trial, rather than at trial.

This approach is consistent with established doctrine that First Amendment interests must be considered before the protected interests are abridged. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Consideration of these interests is required even if ultimately it is determined that they will not prevail in a given case. *See Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Herbert v. Lando*, 441 U.S. 153 (1979).

B. Imposition By Distant States of Jurisdiction over Reporters and Editors Will Have a Deleterious Effect on the Dissemination of News and Public Affairs Information

If First Amendment interests are considered in this case, it is clear that the danger created in exposing appellants to potential liability far outweighs California's incidental interest in asserting jurisdiction. Strong First Amendment interests militate against the exercise of jurisdiction over appellants. If the California Court of Appeal decision is affirmed, reporters and editors may hesitate risking the preparation of controversial articles arising from or even concerning persons in distant jurisdictions. Likewise, reporters and editors actually may be discouraged from presenting fair and balanced stories if the price of such "balance" is submission to a distant state's jurisdiction.

This Court has encouraged journalists to report matters of public interest so that there will be an "uninhibited, robust, and wide-open" debate on important issues. *New York Times Co. v. Sullivan, supra*, 376 U.S. at 270. To do this, journalists must feel free to research thoroughly. If an article is to contain information necessarily generated outside the state of publication, a journalist must at least have the ability to sporadically telephone and occasionally travel to distant states so long as a "presence"

under *International Shoe* is not established. Certainly reporters will be hesitant to take these steps if they know such information gathering procedures will require them to defend defamation actions—including nuisance suits—in distant forums. Instead, they may rely on information they can gather locally. The journalist may not doubt the accuracy of this limited information. However, contact with out-of-state sources might provide additional, more complete, even contradictory information.

Also, a journalist who believes information for a possibly controversial story can be gathered *only* out-of-state may elect not to write the story. Weighing the possibility of being haled into court in a distant state against writing a controversial story, the reporter may well choose to write about a different, less important and more local subject. A reporter or editor does not attain direct or financial gain from writing a controversial story. Even if the publication achieves a greater circulation because of the story, the journalist obtains no direct reward. Thus, there is nothing to counterbalance the risk of facing prolonged litigation in a distant state.

Whether the journalist does not write the story at all or writes it based on limited information, the flow of news to the public is impeded. When a reporter fears the consequences of making an out-of-state telephone call to obtain or to confirm information, the First Amendment's vitality is in serious question.[9]

The number of defamation actions is rising dramatically each year. The fear of defending oneself in a distant court is felt by journalists on small media as well as

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[9] Reflecting on New York Times Co. v. Connor, *supra*, 365 F.2d 567, one commentator wrote: "There is, too, the need to be careful that the movement of ideas across the nation is not inhibited by threat of distant libel actions." Weinstein, *Trends in Civil Practice*, 62 Col. L. Rev. 1431, 1436 (1962). This is no less true twenty years later.

reporters and editors working for metropolitan media and national news gathering organizations.

Amici do not suggest that journalists should be immune from defamation actions. Rather, *amici* contend that occasional news gathering activities should not be considered sufficient contacts to allow imposition of personal jurisdiction in a distant forum.[10] Where the defendant's actions are speech-related, the First Amendment must be a factor in determining whether jurisdiction comports with due process.

The decision in this case of first impression in this Court will establish policy to be followed by all jurisdictions and will affect all mass media. However, appellants' employer, the *National Enquirer*, with its circulation of over 5 million, J.A. 37-43, is not typical of the country's media. While *amici* contend that on several legal grounds appellants should not be subject to California's "long-arm" jurisdiction, it may be that a national publication such as the *Enquirer* can afford the costs of sending its editor and a reporter 3,000 miles for several months to defend a libel action. The majority of the media outlets in this country cannot do this without suffering debilitating financial losses.[11] However, the *Enquirer*, like most other large and small news organizations, would find the loss of key editorial personnel severely disruptive of its news operations.

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[10] For example, a foreign mass medium or news gathering organization maintaining an office and news correspondents in Washington, D.C., for the gathering of news is not "doing business" for the purpose of service of process on one of its reporters. *See* Bulletin Co. v. Origoni, 387 F.2d 240, *cert. denied*, 389 U.S. 928 (1967); Margoles v. Johns, *supra*, 333 F. Supp. at 946.

[11] While for some print and broadcast media a portion of the expense connected with defending against a defamation action may be covered by insurance, many smaller outlets cannot afford to carry libel insurance.

Nearly 11,000 magazines are published in this country, many with small circulations. IMS Ayer Directory of Publications viii (1983). There are approximately 1,700 daily newspapers in the United States, ranging from those with circulations of a few thousand to those with over 1 million circulation. *Id.* Additionally, there are almost 7,500 weekly and semi-weekly newspapers, *id.*, most with limited circulations and small financial bases. Many weeklies are family-owned and operated; many small dailies and magazines are not owned by large corporations. Defending against defamation actions locally would be injurious to these smaller publications. But the time, expense and loss of key editorial personnel involved when editors or reporters are "haled" into a *distant* court —perhaps on the basis of a few phone calls or an occasional news gathering trip—might put the publication out of business. For editors and reporters on a smaller publication, successfully defending against a defamation suit in a distant state might be a Pyrrhic victory—there would be no publication to which to return.

Large television and radio stations are situated like large newspapers and magazines, generally able to withstand the financial drain of sending editorial personnel to defend defamation suits in distant states. But many of the country's almost 1,300 television stations and more than 9,200 radio stations, *Broadcasting*, May 23, 1983, at 87, are smaller operations, located outside major metropolitan areas. They face the same problems as do smaller print media from imposition of jurisdiction over their personnel by distant states.

Different, but just as serious, problems are faced by many editors and reporters employed by large, nationally circulated newspapers and magazines and by news gathering organizations such as Associated Press. These journalists constantly report on and edit stories about events

occurring throughout the country. They do not have the choice to cover more local stories; it is their job to deal with national events. Thus, under the theory of the California Court of Appeal, they constantly will be subject to being sent from coast to coast and border to border to defend against defamation suits brought in states far away from their places of work and residence and far from their employers' bases of operation.

Affirming the decision of the California Court of Appeal could have a devastating impact on the news and public affairs coverage by the thousands of media outlets in this country. Reporters and editors may choose to cover less controversial stories, may hesitate to make news gathering phone calls or trips to distant states and may be reluctant to write stories other than those based on information gathered locally. This self-censorship, prompted by fear of reprisals, should not be sanctioned by this Court.

CONCLUSION

For the above-stated reasons, the decision of the California Court of Appeal should be reversed.

Respectfully submitted,

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APPENDIX A

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June 13, 1983

BY HAND

George R. Clark, Esquire
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Re: *Calder v. Jones*
No. 82-1401

Dear Mr. Clark:

Appellants consent to the filing of a brief *amicus curiae* by the organizations whom you represent.

Sincerely

/s/ John G. Kester
JOHN G. KESTER

APPENDIX B

LAW OFFICES
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May 25, 1983

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Re: *Jones v. Calder, No. 82-1401*

Dear Mr. Landau,

We have determined not to stipulate to your request to file a Brief Amicus Curiae in the above captioned appeal. Accordingly, you should make the appropriate motion to the Supreme Court for permission to file your brief.

Our reason for opposing your request is that your previous amicus brief was essentially a rehash of the arguments presented by Williams & Connolly which offered the Court neither guidance nor insight into the issues before it. In addition, your prior brief in the *Jones v. Calder* matter was filed at the last minute making it impossible for Appellees to respond despite your opportunity to file it at an earlier time in order to permit such a response.

Very truly yours,

/s/ Richard P. Towne
RICHARD P. TOWNE

RPT: csg

No. 82-1401-ASX
Status: GRANTED

Title: Iain Calder and John South, Appellants
v.
Shirley Jones

Docketed:
February 22, 1983

Court: Court of Appeal of California,
Second Appellate District

Counsel for appellant: Kester,John G.

Counsel for appellee: Ablon,Paul S.

Entry	Date	Note	Proceedings and Orders
1	Feb 22 1983	G	Statement as to jurisdiction filed.
2	Mar 22 1983		Motion of appellee to dismiss or affirm filed.
3	Mar 23 1983		DISTRIBUTED. April 15, 1983
4	Mar 24 1983	X	Brief amicus curiae of Reporters Comm. Freedom Of The Press filed.
5	Mar 29 1983	X	Reply brief of appellants Iain Calder, et al. filed.
6	Apr 18 1983		Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits. **********
7	May 12 1983		Suggestion of mootness filed by appellant Iain Calder, et al..
9	May 13 1983		Order extending time to file brief of appellant on the merits until June 17, 1983.
10	May 16 1983		DISTRIBUTED. May 19, 1983. (Suggestion of mootness as to appellee Ingels.)
11	May 19 1983		Response of appellees to appellants' suggestion of mootness as to appellee Ingels filed.
12	May 23 1983		DISTRIBUTED. May 26, 1983. (Suggestion of mootness as to appellee Ingels).
13	May 31 1983		The appeal as to appellee Ingels is dismissed. The motion of appellants to vacate the judgment of the Court
14	May 31 1983		of Appeal of California, Second Appellate District, as to Ingels is denied.
15	Jun 17 1983	G	Motion of The Reporters Committee for Freedom of the Press, et al. for leave to file a brief as amici curiae filed.
16	Jun 17 1983		Brief of appellant Iain Calder, et al. filed.
17	Jun 17 1983		Joint appendix filed.
18	Jun 20 1983	G	Motion of Association of American Publishers, Inc. for leave to file a brief as amicus curiae filed.
19	Jun 27 1983		Motion of The Reporters Committee for Freedom of the Press, et al. for leave to file a brief as amici curiae GRANTED.
20	Jun 27 1983		Motion of Association of American Publishers, Inc. for leave to file a brief as amicus curiae GRANTED.
21	Jun 20 1983	G	Motion of The Authors League of America, Inc. for leave to file a brief as amicus curiae filed.
22	Jul 5 1983		Record filed.
24	Jul 6 1983		Order extending time to file brief of appellee on the merits until August 1, 1983.
25	Aug 3 1983		Brief of appellee Shirley Jones filed.
26	Aug 16 1983		CIRCULATED.

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Entry	Date	Note	Proceedings and Orders
27	Aug 23 1983		Motion of The Authors League of America, Inc. for leave to file a brief as amicus curiae GRANTED.
28	Sep 21 1983		SET FOR ARGUMENT. Tuesday, November 8, 1983. (2nd case) (1 hour)
29	Oct 14 1983	X	Reply brief of appellants Iain Calder, et al. filed.
30	Nov 8 1983		ARGUED.